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Living *with the* LAW

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Living *with the* LAW

by

JUNE PURCELL GUILD

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FOREWORD

A tangled web of legal enactment and judicial opinion hangs over the cradle of every newborn child and clings round him his whole life long. It is as dangerous to ignore as it is to disobey; it is as foolish to reverence as it is to condemn this law. For, unlike the Ten Commandments, the law was not magically super-imposed on man.

For many years it has been my privilege to work for those who are in trouble and with social agencies. I have never been able to conquer a feeling of astonishment, in discovering and re-discovering, how little everyone knows about the laws which affect every-day life. Not many of the lawyers, even, find it financially profitable to waste time studying marriage and divorce law, legitimacy and adoption law, juvenile court legislation, laws governing health and mental hygiene, poor relief and immigration—the very subjects which so inescapably concern every-day life. As for those who call themselves professional social workers and have dedicated their lives to the improvement of community conditions, very few know the laws which touch the life of every member of a community. Not everyone needs

to know how to prosecute or defend a case in court, write a valid will or contract, secure a corporation charter, protect a patent right, form a business partnership, but no one has ever been able to evade both the parental and the marital relationship or the community environment produced by law and law enforcement.

Consequently, this volume has been written with the conviction that men and women living, working and voting in a law-controlled State should look at law dispassionately and understandingly and give to it some of the same common-sense consideration they give to other dominant factors in their lives.

The law simply expresses the will and the desire of the people. It has evolved as they themselves have had the interest to modify it from time to time. The effectiveness of law, as well as its just enforcement, varies with the articulate wishes of the majority. Although there are few situations in life which are exempt from legal complication or obligation, no one can possibly know the exact content of this sprawling, confused mass of constitutions, treaties, statutes, rules, maxims, definitions and court decisions. Lawyers and judges must forever hunt down the elusive precedent and repeal, but there is one legal principle which remains the same: Ignorance of the law excuses no one.

It has been estimated that there are, perhaps, two million laws. City councils, state assemblies and the Congress of the United States, industriously and incessantly, make new laws or amend and repeal the old, all with the positive or the unconcerned connivance of the people. The courts grind out daily decisions. Never for two days in succession, never in any two cities, is the law exactly the same.

Hence, it will be seen that no one book could discuss all the laws we live with, offer more than some pertinent facts about any of the laws, or more than hint at the conflict of legal opinion. The subjects chosen for brief discussion here are those which anyone at a glance may see touch human life every day. The law of *things*, which is always more technical and baffling than the law which relates directly to people in their personal and social relationships, has necessarily been omitted. Also, subjects like freedom of speech, press and religion, tariff and free-trade, conscription, military preparedness and prohibition, vitally important though they all may be, have been written and talked about in many other places and so are not discussed here.

This volume will have served the purpose for which it was written if those who are living with the law and are dealing with it daily will cease trying to ignore it on the one hand; or to remake it on

the other, without an adequate conception of its nature and limitations. If a comparison is made of the main topics considered in this volume it will be noticed that they parallel some of the largest sections in the National Conference of Social Work. Corresponding to the Conference section on "The Family" are chapters dealing with the law on marriage, divorce, husband and wife, and poor relief; corresponding to the section on "Children" are chapters dealing with the law on children and parents, adoption, and illegitimacy; to the section on "Delinquents and Corrections" are chapters on criminal law and procedure; to Conference section on "Health" is Chapter XVII which deals with health laws; to the section on "Industrial and Economic Problems" is Chapter XIX on workers and the law; to the section on "Mental Hygiene" are Chapters XV and XVI on the laws affecting the insane and feebleminded, etc.

Very few citations are given with the text. To have done so would have increased the size of the volume materially, and also have given to every printed page that unreadable, legal-document appearance which has so successfully kept lay people from finding out about law from law books. Partially to make good this admitted deficiency in the citation of authorities, a short bibliography is given at the end. Perhaps it should be added that most

cities have law libraries and that it is not a difficult matter, after the first confusing attempt, to look up any legal subject.

JUNE PURCELL GUILD.

Richmond, Virginia.

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LIVING WITH THE LAW

I

INTRODUCTION

Social Legislation and Law

The phrase "social legislation" has become exceedingly popular in recent years. Yet it is hard to analyze the meaning of the words, so easily used. Probably they mean "the enactment of law as it pertains to people living together in society." But does this literal explanation of the words properly differentiate "social" legislation from other legislation or law? Confusion doubtless arises from the fact that all law, in its essence, is social and results quite naturally from the customs which have grown up from the daily living together of people. Fear that some members of society would not obey custom has made prescribed rules, or law, necessary for the protection of the other members of the group. There are some who use the phrase "social legislation" merely to cover "labor legislation." As used by

social or welfare workers, indeed even by lawyers, "social legislation" nowadays seems to connotate any legal protection of an uncommonly progressive type. In other words "social legislation," as that phrase is often used, seems to describe a specific kind of modern law which is designed to affect with peculiar intimacy the lives of people, by bringing about a better social order, through extraordinary legal safeguards. Perhaps an even broader use of the phrase "social legislation" should be encouraged. Why not use it to describe the law which the average person should know for his own protection, understanding, and effectiveness; the law which every man and woman should know who has the urge to improve social conditions; or even the desire to perform, acceptably, his duties as a citizen? In this sense all law is clearly "social" and some knowledge of legal fundamentals becomes a prerequisite to almost any undertaking.

The Relationship of Law to Life

Certainly law affects the life and the living of every person from the very hour of his birth to the hour of his death. A moment's consideration will show how true this is. Laws against contraception are common; without them many of us would not have been born. Causing abortion or miscarriage,

unless to save a life, is a crime. The legal marriage of a man and a woman is necessary, generally, to legitimatize offspring. As a rule, the person attending a woman at confinement must be a licensed physician or midwife of certain qualifications. A birth, in an increasing number of states, must be publicly and promptly registered. Many jurisdictions now require the use of medicinal drops in the eyes of a newborn infant to protect from infection and possible blindness. The residence, the custody, the right to support, and the education of a child are matters all fixed by law. So all through life, status is established—or altered—by the terms of the law of the country, the state, and the city in which we happen to be born, to live, or to have our property, if any. . . . And at the end there must be a burial permit and a public registration of death. . . . Social legislation, then, may be taken to mean the law which should be understood to live efficiently and to work effectively for the well-being of others. This by no means suggests that everyone should have a legal education or attempt to become a practitioner at the bar. As a matter of fact, more general understanding of legal philosophy would tend to increase respect for bench and bar for it is usually the ignorant person who is loudest in his criticism of the legal profession and expects impossible decisions from judges.

Ignorance of Law Inexcusable

"Ignorance of the law excuses no man,"—nor woman. So it is not well for anyone to continue to regard law as a musty thing apart from life, set aside for the use only of politicians, tricksters, and students of the abstract. For law is the basis of all civilized living together. It decides, within definite limitations, whom we may marry, when we may marry, how we may marry, and what our duties, obligations, and responsibilities are, after marriage. It grants or withholds divorce or remarriage according as it is written in the statute books. It affects such personal and diverse questions as what taxes we shall pay, what the rate of interest may be, with what countries wars shall be fought, and at what age, if at all, we may be drafted. It decides for us on what side of the street we may drive our motor car and at what rate of speed on the open highway and in the built up city. We may not even torture, overload or starve our own animals. We may have to secure a license to be a lawyer, a barber, a teacher, a plumber, a peddler, a pawnbroker, . . . or what would you be? . . . According as we have certain kinds of law and law enforcement do we have pure water, pure milk, pure food, pure air. On these things may life itself depend. We should do well these days to take thought, what we should drink,

yea and wherewithal we should be clothed. For the law denies us the right to drink beverages of a prohibited alcoholic content, to possess habit-forming drugs, to go naked on the public highway, or to perform ablutions in public, unless on the bathing beach. It is forbidden to keep places of business open on Sunday, or indulge in common swearing, or housebreaking, or sex relations with the spouse of another. To end it all by suicide may be a crime, in a legal sense, in one jurisdiction; merely a sin in another; and an ethical mandate to a brother across the sea. At common law suicide was regarded and treated as a felony and the property of the deceased was forfeited to the king. Nowadays one who counsels a suicide which is committed in his presence is still guilty of a crime in several states.

How then shall a man or a woman live adequately who does not know even the simplest elements of legal principle or procedure? Particularly how may we trust the one who is attempting to deal with the intimate problems of others, or the complex conditions of modern society, who is totally ignorant of, and totally ignores, all that vast field of legal precedent and precept which governs life? The answer is, of course, that no one is living independently of law, however remote from civic and legal affairs he may imagine himself to be, and for any effectual social activity, some knowledge of law

is indispensable. To give this information in simple form to teachers, social and civic workers, and whoever cares to know something about the law is the purpose of this book. The task presents almost insurmountable difficulties. There is hardly a legal proposition on which the courts of the United States and all the forty-eight states agree. Precedents are being upset—and established—daily. And every time a state legislature meets it busies itself passing a vast volume of new law,—and amending old!

Is it not this very complexity in the law under which we live which should stimulate the intelligent citizen to a questioning interest in the subject? Living with and within the law is not an easy matter any more and it is going to be increasingly difficult unless those who are not already entangled in the law become better acquainted with it.

II

OUR JUDICIAL SYSTEM

The Common Law

As has already been suggested law, or more properly common law, is the result of immemorial custom, which has received judicial recognition and has become established rule. This recognition by courts of what the law has been is to be found in precedents. In the United States the basic law is the old common law of England modified from time to time by judicial decisions and by legislative enactments.

What is International Law?

In our intercourse with other nations we are supposed to be governed by international law which—again based on custom,—is usually unwritten but may be embodied in treaties. As long as there are no rumors of war the meaning of international law seems to be plain; when wars are brewing international law is apt to become a rather meaningless term. Perhaps a world federation of states with a world court interpreting and enforcing the statutes

of a parliament of nations may at last bring international law to greater practical importance. Just now only a diplomat knows what it is.

The Basis of Federal Law

The written law of the United States is found in the Federal Constitution and the laws passed by Congress; the written law of the several states in their constitutions and legislative enactments, all of which must be in harmony with the Federal Constitution. By the terms of the Federal Constitution, Congress has the power to pass certain laws, only. For instance, Congress has the right to legislate on interstate commerce, Indian affairs, naturalization, bankruptcies, coinage of money, postoffices, copyrights and patents, military and naval affairs.

What is War?

Congress has the sole power to declare war. Since the Constitution nowhere defines war, the executive department of the government sometimes, as in the case of Panama, Haiti, Nicaragua, involves the people in warlike altercations which have the semblance and effect of war. The several states may not make treaties, coin money, make anything but gold or silver legal tender, pass retroactive laws, or

laws impairing the validity of contracts, or engage in war.

Federal Constitution: Amendments

In the amendments to the Federal Constitution the right of Congress and the respective state legislatures to make laws is further restricted. Congress can make no law respecting an establishment of religion or interfering with the free exercise of religion, or abridging the freedom of speech or press, or denying the people the right to assemble peaceably, or to petition the government. The right of the people to bear arms may not be infringed, nor their right to be secure in their persons and houses against *unreasonable* searches. Warrants must be issued only upon probable cause supported by oath describing the person to be seized or place to be searched.

Interpreting the Constitution

The mere innumeration of these items is possibly misleading. To the one untrained in legal analysis they may sound straight-forward and uncertain. But the law libraries are full of books containing definitions and explanations of these phrases, and the courts of the land are forever clogged with lit-

igants and lawyers with honest differences of opinions on the meanings of these phrases. Would it seem perhaps to you that a Mormon had a constitutional right to the free exercise of his religion, a conscientious objector to speak freely against conscription, strikers to assemble peaceably to discuss a living wage, bootleggers to keep liquor free from search and seizure except after the issuance of a warrant? Only a treatise on constitutional law could give you satisfactory answers to such questions; perhaps not even that. The real point at issue is: Such questions as these affect intimately the life of every person but no one should feel himself entitled to an opinion at all on any of these matters who has not given at least some time to the study of the constitution of his country and a simple text on interpretation.

What is Constitutional?

The Federal Constitution also says no one may be deprived of life, liberty, or property without due process of law. This "due process" clause may sound clear. In actual practice the meaning of the words is much in doubt and has given rise to an enormous amount of litigation. Probably "due process" at the time the Constitution was adopted was vaguely identified with the age-old customs of

the common law. "Due process" today must be the same thing. . . . But as it has been subtly modified by the personal and legal opinions of the judges who have attempted to define the phrase in the many cases presented for consideration since the adoption of the Constitution. This is true of practically every clause of the Constitution. All the laws passed in the United States must be in harmony with the terms of the Constitution or else they are "unconstitutional" and not binding. The Supreme Court of the United States has the power to make the ultimate decision on the constitutionality of every law passed in the United States. There seems to be some dissatisfaction with the exercise of such broad powers by this group of nine judges, who may decide a law, enthusiastically passed by the people, unconstitutional by a vote of five to four. However, unless we wish to amend our Constitution again, and change the general theory of our government, there seems no way of avoiding this situation. In England, where they have no rigid, written Constitution, any law which the people as represented in Parliament want at any time, may be passed.

Protections for Accused Persons

The Constitution also contains a number of provisions which relate to persons who have been ac-

cused of crime. An indictment by a grand jury is necessary in every capital or otherwise infamous crime. No one may be put twice in jeopardy for the same offense, nor be compelled to testify against himself. The accused has the right to a speedy and public trial, by an impartial jury. He must be informed of the nature and cause of the accusation, be confronted by the witnesses against him, have compulsory process to obtain the presence of his own witnesses, and have the assistance of counsel for his defense. In criminal cases and in civil cases involving over $20.00 the right to trial by jury must be preserved,—and a judge does not have the right to overrule a jury's decision on matters of fact but may direct them in matters of law, only. Excessive bail may not be required, excessive fines imposed, nor cruel and unusual punishments inflicted.

Have We Outgrown the Constitution?

It should always be kept in mind that the Federal Constitution was formed in 1787 and the new government went into operation in 1789 so that the meaning of the Constitution today must be accepted as nearly as possible according to the definitions and the attitudes of those days. For example, when electrocution as a punishment for crime was proposed, it was claimed that it was a cruel and unusual

punishment; the courts, however, held the contrary. Again, there are some who maintain that sterilization is a cruel and unusual punishment. With this some courts have agreed on poorly constructed laws. On the other hand, laws on this subject have been so drawn that sterilization is neither "cruel" nor "punishment." The more carefully worded laws are of course constitutional. It should be remembered, too, that some of the provisions of the Federal Constitution refer only to cases in the United States courts, although most of the state constitutions contain similar protections for persons tried for crime under state laws.

Citizenship and Voting

The fourteenth amendment of the Constitution states that all persons born or naturalized in the United States are citizens of the United States and of the state wherein they reside. Although this amendment was especially designed to protect the Negroes of the country, the statement undoubtedly covers infants and women. That is, a baby in arms is a citizen and a woman is a citizen if born or naturalized in the United States, because they are "persons." This may be a good place to point out that before the passage of the nineteenth amendment which gave women the franchise, it was no uncom-

mon thing to hear the suffragists eloquently demanding that "citizenship" be conferred on them. What they meant was that as citizens they demanded the right to vote. A corporation, it has been held, is a "person" within the meaning of this section. And some way or other the corporations have been able to secure for themselves, whether in the North or in the South, a good deal more of that "equal protection" than have the Negroes of the country. . . . By the fifteenth amendment the right to vote cannot be denied by any state on account of race or color. For a full explanation of the virtually complete disfranchisement of the southern Negro the reader is referred to any Southerner. It would be well, however, for critics of the South to keep in mind that laws which deny the right to vote to *all* who do not pay a required annual tax, or who do not have certain education, fall outside the terms of this amendment. The Federal Constitution does not guarantee Negroes free, compulsory education!

The state governments have all the power which is not expressly denied them or which has not been delegated to the United States. The state constitutions as well as the state laws which are passed by the various state legislatures must be in harmony with the Federal Constitution.

Federal Courts

The judicial power of the United States is vested, according to the terms of the Federal Constitution, in one supreme court and such inferior courts as may be from time to time established. The judges are appointed by the president with the advice and consent of the Senate and hold office during good behavior. Sometimes, perhaps, it is none too clear what constitutes judicial "bad" behavior. At the present time, there are nine Federal circuit courts, nine circuit courts of appeals, eighty-seven district courts, a court of claims, a court of customs appeals, a Federal court for China. The United States supreme court has original jurisdiction over cases affecting ambassadors, public ministers and counsels, cases where a state is a party. In other cases a matter may get to the supreme court on appeal if it is a case which involves the constitutionality of a law, arises under a law passed by Congress, involves a maritime affair, or is a controversy between two states, between the United States and a state, between a state and citizens of another state, between citizens of different states and so on. Congress has passed laws regulating in which of the subordinate courts various claims must be started and what cases may be taken from lower courts to the supreme court, and just what procedure shall be followed.

State Courts

All the matters which are not triable in the Federal courts are triable in the state or city courts which have been established by the various state constitutions and state statutes. The method of selecting state judges varies considerably. In most of the states they are elected by direct vote of the people; in some they are appointed; in others they are chosen by the state assembly. The term for which they are named varies from almost any number of years to life. The names of the state courts are different but all the states have one supreme, superior, or high court of appeals, intermediate courts of review, located by districts or circuits, and courts of general and original jurisdiction known as county courts, common pleas courts, district courts, etc. There is a wide diversity in the names and powers of other local or limited courts. Courts having jurisdiction over descendants' or minors' estates, guardianship, and so on, are called surrogate, orphans', probate, or in Georgia courts of ordinary. In New York a court having original jurisdiction in criminal cases is called the court of general or special sessions. In New Jersey they have a court of general quarter sessions and, in Virginia, a hustings court. There are other inferior courts which have limited jurisdiction in civil and criminal mat-

ters; hear cases arising under city ordinances; and preside in preliminary hearings. These courts are variously called justices' courts, police courts, mayors' courts, magistrates' courts, corporation courts, etc. It has become popular in recent years to combine all the inferior courts of a city into a municipal court system which has somewhat enlarged powers and is able to transact much legal business which would otherwise go to the slower moving and more technically conducted county or state courts.

Some Special Courts

To reduce expense and speed up justice in controversies over small debts and wages, small claims courts, small debtors' courts, and conciliation branches have been established in some cities. Arbitration in commercial and labor disputes has also had an increased use in late years. Speeders' courts and branches have also been established to keep the regular courts from being so clogged that speedy justice would no more be possible. Morals courts or divisions with special machinery for social investigation and medical treatment are now functioning in some places. In an increasing number of communities courts of domestic relations with informal socialized procedure for hearing cases of

truancy, illegitimacy, delinquency, adoption, and custody of children, the abuse, desertion, support, separation, and divorce of husbands and wives, and kindred subjects have been organized. A desirable tendency seems to be to give to one such court jurisdiction in all domestic cases but unfortunately there does not seem to be a court of domestic relations in the country with *exclusive* jurisdiction over all matters affecting the home, husbands, wives, and children. At the present time the authority of some of these so called courts of domestic relations is much limited and extends only to questions of abuse and support of married people and children.

Juvenile Courts

Somewhat the same confusion exists in the field of juvenile court legislation. With the possible exception of Maine and Wyoming, during the past twenty-five years juvenile court laws of one sort or another have been adopted in every state. The age of the children coming before the juvenile courts ranges from under sixteen years to twenty-one years. There is little agreement as to the type of case or problem which should properly come before such courts. Only about half of the courts have probation service and very few *adequate*, probation service. Juvenile court laws are administered by dis-

trict and county courts, police courts and probate courts, municipal and independent courts. There is no uniformity whatever in the essentials of social investigation, record keeping, medical and psychiatric service, informality and privacy of hearings.

Who is Responsible for Law and Courts?

The exact organization of the many state courts, the particular type of cases which any of them may try, the rules by which cases may be reviewed in upper courts, are all matters over which the several states have the power to make their own laws. Consequently there are many differences in the systems in use in the forty-eight states. All this should be remembered by those who criticize the law's delay, the technicality of procedure, and the cost of litigation. These are matters,—within the limits of the Federal Constitution and state constitutions,—which may be changed in any way and at any time by the voters. And of course constitutions may be amended so as to make a completely new judicial system possible in America. It is really not remarkable that a Federal Constitution adopted long ago should not be appropriate in every detail to an age of radio, television, aeroplanes. On the other hand, extensive modifications would be disastrous if made by an electoral which knows nothing of the theory

and practice of English and American law and next to nothing of the history of our constitutional form of government.

But how many voters do?

III

DIVIDING THE FIELD OF LAW

Thus we see how the Federal and state constitutions establish the *general* rules concerning what may or may not be law, and how a system of interpretation and enforcement is built on city, county or state, and Federal courts. What the specific *content* of the law may be at any time and in any place depends to a considerable extent on the activity of Congress, state legislatures, and city councils in passing statutes and ordinances; and of course, the decisions handed down, daily, by the courts of the land. However, there are many fundamentals of law which may be regarded as reasonably well established and which should be known, at least superficially, by every citizen.

For our purpose here it may be well to attempt to classify law according to several major subdivisions which are commonly recognized, but which are not mutually exclusive. In other words, all American law may be divided in several different ways. First of all, as has already been suggested, all law is Federal or state. The power of city councils and city courts, county boards and county

courts, is dependent on the authority delegated to them by the several states. Or a law may be written or unwritten. Written law has been formally enacted by the people through the regular legislative channels and is to be found in statutes and constitutions. By unwritten law is meant the law of legal maxims, legal definitions and judicial decisions, that stupendous body of judge-made law which has grown through the ages. Common law and equity are both included in the unwritten law of the land and are to be found in thousands and thousands of court reports, or judges' opinions. Equity grew up in England later than the common law and really was intended to take away some of the technical harshness of the common law, give justice in certain cases where the common law failed, and, generally, supplement its inadequacies. Equitable principles gradually came to be embodied in established rules and precedents substantially as definite and unyielding as the common law. Although equity is a regular part of American law it has not been universally adopted as a separate legal system by all of the states in the *same way;* in some states judges of courts of law also exercise equitable or chancery powers.

Substantive Law and the Law of Procedure

Again, the law may be properly designated as substantive, or the law which relates to legal rights, wrongs, and duties; and procedural, or the law which relates to pleading and evidence or the conduct of actions in court.

In another sense, all law may be said to be civil or criminal; civil law being that which relates to persons in their ordinary or private affairs, and criminal law that which relates to offenses against the public. An old classification was civil and canon law. So far at least the American people have been able to keep free from the dictation of any church in public affairs. . . .

Contracts, Torts, Crimes

Civil law is very largely concerned with violations of written and unwritten contracts; and torts, or those private injuries which arise independently of contract and which give to the one injured the right to damages. For example, an action in tort may be brought by one who has been injured by the careless driving of another, or by a slander, or by a false arrest. A crime is the commission of an act against society which has been forbidden by law. A crime may or may not be a sin, that is it may or may not

be immoral in itself, or "malum in se." A crime may be merely the doing of some thing forbidden or a "malum prohibition," which is wrong only because the law says so. Probably, it is not fundamentally immoral in itself to drive through a red light, but where it is prohibited by law, the one who drives through red lights is, at least, guilty of a misdemeanor,—a low order of crime. It should be noted that a public wrong or crime may be at the same time a tort. For instance, assault and battery is a crime against the well being and the security of all society and is punishable by the state in the name of its own peace and dignity. At the same time assault and battery is certainly a special injury to the battered person. For this peculiar and extraordinary injury which he alone has suffered, he may bring court action for damages, an action in tort,—against the guilty one and his estate. At the old common law crimes were so often punishable by death and forfeiture of property that the private injury almost had to merge into the public crime. The guilty one,—or his estate,—had nothing left for the one who had been personally injured. The old punishments are no longer in force, but criminals today are not infrequently poor people. Hence, the right to sue them for money damages is not of great practical value.

Law Protects Rights, Redresses Wrongs

Finally there is another and perhaps more comprehensive way of describing the field of law. It may be said that all law is designed to protect rights and redress wrongs, and for every legal right there is a legal remedy. As we have just seen there are private wrongs or torts, and public wrongs or crimes. Then there are public and private rights. Public rights are those which the people as a whole possess, to create governments, to tax property, and to take property by eminent domain; and those rights which the government may enforce on the citizens, such as allegiance, obedience, performance of military service on behalf of the common welfare, and so on.

Absolute and Relative Rights

From what has been said it is obvious that life and law are and must be inescapably interrelated. In the field of private rights, however, this intimate relationship cannot fail to be seen, even by the most casual and indifferent. As the writer has worded it in another place:[1] "In law the private rights of man are two: Absolute and relative, all rights always yielding to public necessity. By absolute

[1] "Social Workers and the Law," *The Survey,* September 15, 1926.

rights are meant the natural and inherent rights of man to personal security, personal liberty, and private property. By relative rights are meant those which arise in an individual as a member of society in relation to another member, for example, husband and wife, parent and child, guardian and ward, employer and employee." A discussion of the meaning of these private rights in some of their everyday applications should be of real value and interest to everyone, who would live within the law.

IV

ABSOLUTE RIGHTS

Personal Security

There could be no life, liberty, nor pursuit of happiness without the primary and basic right of personal security. In this phrase, the law recognizes the right of every human being to live his life free from injury or interference; the right of all to enjoy good health and good reputation, unless they have been forfeited by act of God, personal neglect or misconduct. Intentional actions which interrupt the enjoyment of another's life, health, reputation, therefore become torts—private injuries—or crimes. But it should always be remembered that in society the rights of one are contingent on the general welfare of all. That is, life may be taken legally in self-defense, in war, as punishment for crime, or always, by "due process of law."

Liberty of Bodily Movement

Personal liberty does not mean, as bootleggers and patrons of bootleggers argue nowadays, that

you have the right to do as you please. In a democracy you have the right to do, only, what the majority has decided is fitting and proper. Individual taste and activity must depend on the superior rights of the group, otherwise there would be neither safety nor liberty. Fundamentally, personal liberty means the right to enjoy freedom of movement, the right to come and go without hindrance. Consider, however, the legal restraints imposed on persons in certain relationships, and conditions: insane persons, soldiers, children, drug addicts, wives, employees, persons convicted of crime, Negro slaves prior to 1865 in the United States. Unjustifiable interferences with liberty are redressible by actions for damages. Or writs of habeas corpus may be secured to regain liberty illegally lost. But no one may claim a denial of liberty who has been regularly called as a juror, a witness, a defendant in court.

Religious Liberty

Unlike most countries, complete freedom of conscience is guaranteed in the United States. But clearly all religious practices must conform to the accepted standard of decency and morality of our people. A religion which advocates polygamy for instance may be legally suppressed so far as that one doctrine is concerned. Possibly also, theological

dogma and custom have a good deal to do with the interpretation of the meaning of the phrase religious liberty. Where "blue laws" for purely religious reasons interfere with freedom of bodily movement and recreation on Sunday the question may be raised whether they will stand the test of a more tolerant age, say one hundred years from now. If the law requires the suspension of business for the protection of the health of the workers, that is another matter of course. If "profanely swearing by the name of Jesus Christ and the Holy Ghost" is a crime in Ohio [1] because *all* boisterous talk amounts to a nuisance and disturbs the peace of others, it would seem an appropriate law. Although whoever heard of a law in the United States making it a misdemeanor profanely to swear by the name of Allah? If a law against profanity is passed—as seems probable—in a vain effort to increase respect for the *Christian* religion in a country where there is no established religion, its propriety may well be questioned. The truth of the matter is there is no established religion or church in the United States but in a modified sense Christianity is probably a part of our common law heritage from England.

[1] Ohio Statutes; Section 13390.

Liberty of Speech

Then there is liberty of speech and press. We are all free to speak and write on any subject. As everyone else has the right to be secure in his reputation, the abuse of the privilege may subject us to a damage suit, or in some cases, to prosecution for crime under statutes on criminal libel.

Right of Private Property

The law classifies the right to acquire, hold, and dispose of land and movable property as the right to private property, the third of the inherent and absolute rights of man. It is a little difficult to follow this reasoning when the enjoyment of property seems so completely dependent on the existence of an orderly state, and the right to accumulate goods so subject to man-made contingencies, such as hours and type of work, wages, prices, taxes, wills, inheritance, dower, alimony and support laws. In other words, it would be easy to assume that private property is more a social and civic concept than a natural and innate right of man as man.

A very large part of the law is concerned with the protection of private property. There are so many complex rules about it that no one could expect to know them all. Yet, everyone who owns any prop-

erty, or who ever hopes to own any, should try and familiarize himself with a few simple legal principles about the ownership of property. Perhaps after all, the layman's greatest protection against mistakes in this field is a realization of ignorance on the subject.

V

MARRIAGE: FROM THE LEGAL STANDPOINT

Marriage: A Social-Legal Institution

However sacred property rights may be, other personal rights deserve greater consideration here, especially by those who are dealing with the individual case problems of people, and are at the same time attempting to prevent others from coming to distress. Many of the private personal rights of people are said to be relative, in legal terminology, because their operation is contingent on relationships which may or may not exist between certain persons in society. Ordinarily no one may be required to enter the state of matrimony or to become a parent, but the choice once made, the conditions surrounding the relationships, the rights, duties, and responsibilities arising therefrom are largely established and controlled by law. It may be true as some say, that there is, or should be, an absolute, inherent, and inalienable right to marry and have offspring. But in society the right is so regulated that there have always been some persons barred from intermarriage, near kin and certain children

for instance; and unmarried couples have never been able to have *legal* offspring.

What Shall We Do with Marriage?

Never has there been such a clamor about marriage. Never were so many books being written, and read too, about marriage. Never was there so much discussion on the subject in magazines; nor so much talk whenever and wherever two or three are gathered together. And never were so many, and so increasingly many marriages ending in divorce. Appropriately enough most of the talk about modern marriage is of a social or psychological nature. There is much speculation concerning the continuing inevitability of monogamy in a civilized society, of the feasibility of trial marriage, the desirability of free unions, and the merits of familial and companionate marriage. Everywhere there is a claque on sex appeal, legalized birth control, the spiritual and physical basis of marriage, the right of married women to "self-expression" and independent careers. Trained social case workers capable of studying and adjusting personalities and environment are making some progress, perhaps, in bringing harmony into certain domestic situations. However, as the case technique is at present apparently preëmpted by those who deal almost solely with the problems of

the clients of charitable or welfare agencies its contribution to a general solution of marriage problems is slight. Conciliation departments of courts, —extensions of the very old idea of friend of the court,—are able to bring about marital reconciliations, sometimes, through social investigations and friendly adjustment. A few feel that some progress in stabilizing marriage could be expected from the use of a well organized national desertion bureau functioning with the coöperation of prosecuting attorneys under drastic and uniform laws against the desertion of minor children and dependent wives. There seems to be a growing belief that happier and more successful married life would be possible if there were segregation or sterilization of the unfit. . . . Unfortunately, neither popularly nor scientifically is there agreement as to what constitutes marital unfitness. . . . There are still living a militant group of economic determinists who argue that higher and more regular wages for husbands, based perhaps on number of dependents might make home life happier and therefore prove effective in discouraging divorce. Church people continue to believe that a return to old-time religion with difficult or impossible divorce is the panacea needed. On this question, as on every other question in the world, there are those who carry the issue of unhappy marriage straight back to the door of igno-

rance and claim that on classes in sex hygiene and parent-training all the salvation of the world depends. Those who formerly thought that intoxicating liquor destroyed homes and marriages now insist that the lax enforcement of prohibitory legislation is sending all to eternal unrest.

A philosophical interest in the nature of marriage and how marriage is to achieve a greater permanence among us is to be, by no means, belittled. But a safer course for matrimony will be charted by those who have a rather clear idea of their *present legal* whereabouts. Already there is not a little demand for a uniform marriage and divorce law. While this is a recognition of the essential legal character of the relationship, the precise implications of a uniform law are far from being understood by all who are calling for it.

Legal Nature of Marriage

Many people, including some legal authorities, refer to marriage as a contract or a civil contract. Now, probably the essential thing about an ordinary contract is that its terms and conditions are set by the voluntary agreement of the parties. Also by mutual agreement a true contract may be rescinded at any time. The nature of marriage is very different. Its duties and responsibilities are not set

by the parties but by the law. Indeed if they mutually agree before marriage that they will not live together, or will not have children, or will ask for a divorce at the end of a year, courts would not give legal effect to such agreements. Neither may the parties by their mutual and voluntary act end a marriage; only death or a divorce decree can do that. In fact the law is so jealous of its sole right to judge when a marriage should be ended that divorce courts withhold decrees when collusion exists between the parties. Of course there are those who believe that when the husband and wife are both so anxious to escape the bonds of matrimony that they agree, for once, to work harmoniously together to secure a divorce that courts should assist them. Although this is not the law, undoubtedly many divorces are granted every day where there actually has been a corrupt conspiracy between the man and the woman to regain their freedom.

It should be clear therefore that to call marriage a contract is misleading. The engagement, or the agreement to marry is a contract. The fulfilling of the engagement establishes a relationship, a status, an institution, essentially legal in all its conditions but with a dash of religious flavoring.

Conflicting Marriage Laws

Marriage is not one of the subjects on which Congress may pass laws. Consequently there are as many marriage and divorce laws as there are states in the Union. Whether the states should be deprived of their home rule on this subject by an amendment to the Federal Constitution is a question on which naturally there is a very wide difference of opinion. Uniformity on certain basic fundamentals would seem to be highly desirable. But considering the extent to which law is colored by the religious and racial prejudices of the majority, it is not improbable that it will be a very long time before there will be any unanimity on what the basic fundamentals are. A reasonable agreement on marriage laws could be brought about as readily by educational propaganda as by Federal legislation which would not be desired by some of the states nor by all the people of any of the states.

VI

WHEN IS A MARRIAGE NOT A MARRIAGE?

Essential Principles

Although uniformity is lacking in American marriage laws, there are some essential principles which operate in them all. That is to say, the validity of every marriage involves a consideration of at least the following factors:

First, have the statutory formalities concerning license and ceremony been followed? If a marriage is informal or nonceremonial will it, nevertheless, be regarded as valid, because the parties intend in good faith to become husband and wife? In other words, does the marriage constitute a common law union? And does the state where a given marriage is in question, recognize common law marriages?

Second, are the parties capable of an understanding consent and have they actually given it? Are they old enough? Are they acting freely or under duress? Are they idiots or low grade morons? If they are, does it make any difference?

Third, is a marriage impossible in a particular case because of definite legal bars? That is to say,

are the parties too closely related? Or is one of the parties already married? And so on, and on!

What is Common Law Marriage?

An intention to become husband and wife followed by a living together, without a formal ceremony, is a common law marriage; an illicit connection however long it may last, is not. Sometimes a public living-together attended by other circumstances which have given rise to a general reputation in the community for the marriage of the pair, raises a legal presumption of a common law marriage. Prior to the American Revolution the English Parliament had forbidden such informal unions previously held valid by the common law. In the United States non-ceremonial marriages are still recognized in over half of the states. This is true, in spite of the fact that every state has statutes providing for some system of licensing, and either civil or religious ceremony. Common law marriages are recognized on the theory that if a state has not specifically abolished them they exist because they were valid at the old common law which is the basis of modern American law. That is: courts have decided that marriage statutes are "directory and not mandatory." They are supposed to be obeyed but failure to obey in the majority of our states does

not vitiate a union which would have been good at common law. Courts have taken the attitude that there should be a legal presumption in favor of marriage and not against it; also that the rights of women and children are best protected in this way. Illinois, California, Wisconsin, and one or two other states have passed laws declaring common law marriages invalid and the courts of a number of other states have decided against them. Whether public policy and morals are materially promoted by the abolition of common law marriages remains a moot question. There are hundreds of cases involving almost every conceivable set of human circumstances which have been before the courts for decision. That the courts are hopelessly divided on the issue may be seen from the following citations. An Ohio court,[1] for instance, defines a common law marriage as follows: "A simple agreement between one man and one woman, who may lawfully contract, that they will take one another as husband and wife henceforth, and that they will sustain this relationship as long as they both shall live, with the mutual understanding that neither can rescind, followed by cohabitation," . . . "and their marriage is just as valid in Ohio as though a chime of bells played a wedding march and half a dozen bishops and clergymen assisted in the celebration before a

[1] 13 C.C. 62—Schwartz *vs.* State.

thousand people." This language was used by a court of a state which has definite, legal provisions for license or bans, and the performance of the marriage ceremony by a legally authorized person. In the case referred to the couple had lived together for nine years without formal marriage, had had two children, and had held each other out in the community as husband and wife. Then the man tired of the woman and married another in regular form. The court held that the second marriage was bigamous.

In a recent Ohio case a man and woman were married with all the statutory formalities. The man was at the time already married. Later the legal wife of the man died and he continued his marital relationship with the second woman who did not know about the first wife. The Supreme Court of Ohio held that the original illegal marriage became good at common law after the death of the first wife.[2]

Let us now consider a Massachusetts case which takes the opposite view.[3] The man and woman acted throughout in perfect good faith. They gave notice of their intention to be married in the office of the city clerk. They were given a certificate which was afterward returned by them properly

[2] Johnson *vs.* Wolford, 157 N. E. 385.
[3] Commonwealth *vs.* Munson, 127 Mass. 459.

signed, in which they stated they had been married publicly and by mutual vows. The facts were they had had a public ceremony, in a church, before about fifty witnesses. The man and the woman had each used solemn words of intention to become husband and wife. They took hands and prayed and gave their public consent to be married to each other forever. After this, believing themselves to be legally married, they lived together as man and wife and so far as the record shows happily ever afterward, and decently. The Massachusetts courts held that the marriage was not a valid common law marriage because no magistrate nor minister had officiated.

Advance Notice of Intention

In a group of eight or ten states, including all the New England States, an effort to discourage hasty marriage has been made by providing that two, three, or five days must elapse between the application for a marriage license and the granting of the license. In some states the advance notice law applies only to non-residents. Wisconsin requires the public posting of the notice. California recently passed a notice-of-intention-to-marry-act, which has been called a "gin marriage" law because it is presumed that many ill advised marriages are the result

of partial intoxication. Whether parties may legally avoid the necessity of waiting for a license by going into another state—or country—to marry is again a question of individual state law.

Conflict of Laws

The generally accepted legal rule is that a marriage is valid everywhere if it is valid in the place where it has been entered into. This rule has been abrogated in more than a dozen states by so-called marriage evasion acts. These laws declare that when persons go out of their own state to marry, merely to avoid the laws of their state, the legality of their marriage will be governed by the laws of the state in which they have their domicile. Some of these marriage statutes cover every attempt to escape the operation of the laws of one's own state. A few refer merely to bigamous, incestuous, or miscegenetic marriages.

What Consent is Necessary to Valid Marriage?

What is meant by legal consent to marry? In a word it means that parties freely, voluntarily, and mutually agree to marry, are old enough to marry, and at the same time are neither so insane, feeble-minded, nor drunk that they are incapable of under-

standing the nature and the consequences of marriage. Different states interpret all this differently. After making due allowance for differences of opinion the following suggestions should be of some help in deciding when a marriage may not be a marriage.

Voidable or Void Marriages

A marriage ceremony before a minister and witnesses, with proper responses, with parental consent, and "bless you my children," pronouncement of "now you are man and wife," will not constitute a marriage if there is no intention to marry. This may seem a hard and unreasonable rule for those who write plays and scenarios, but it seems to be the law. Joke marriages and stage marriages are not legal marriages because intent to marry is obviously lacking. It is just as clear that a woman is not legally bound if she goes through a ceremony against her desire and in fear of her life with a gun at her head. On the other hand, marriage under a false and assumed name does not invalidate the consent. All this will doubtless come as a great surprise to theatregoers. Again, if the hero awakes after the wild night before to discover to his amazement that he has married the designing chorus lady he need not regard the marriage as legal and irrevocable. If one is so drunk that he literally does not

know what he is doing, he does not give an understanding consent to marriage. If a very rich and very old man is mentally weak and confused he may be able to escape from the young adventuress who marries him without his legal consent.

May an Insane Person Marry?

To be sufficient to make a marriage void, disease or defect of the mind must be so great as to render the person unable to understand marriage and its consequences. Peculiarity, eccentricity, delusions on subjects unrelated to the marriage, even the guardianship of an insane or feebleminded person, will not impair a marriage otherwise good if the parties know what they are doing and intend to do it. The social consequence of such legal conceptions may very properly be questioned. But those who question, should at the same time remember that the principles governing the heredity of the various mental diseases and defects are as yet, by no means perfectly understood. To deprive *all* insane and *all* feebleminded persons of the right to marry would seem scientifically unsound and socially unnecessary. . . .

Divorce Easier Than Annulment

If a woman marries a man believing him a great catch, but later discovers he is a penniless profligate with a long criminal record, will the courts relieve her of her bargain? In the absence of special statutes, no. There would be little stability in any marriage if the courts tried to correct the mistakes of people who rush pell-mell into marriage before discovering for themselves the facts about the character, health, social rank, and fortune of the mate chosen for better or worse. In some states there are statutes making conviction of crime either before or after marriage ground for divorce, however. Mere lack of previous chastity in a wife cannot be assigned by a husband as cause for avoiding or annulling his marriage to her. The reverse rule is generally held if the wife is discovered to be pregnant on marriage when the husband himself has not had relations with her before marriage.

Modern divorce laws are giving aid in some cases where the general principles of marriage annulment law would not recognize the right of courts to grant relief. In over one-fourth of the states pregnancy at the time of marriage unknown to the husband is also made a specific cause for divorce. In Iowa if the man had been the father of an illegitimate child before marriage and his wife did not know about

the child, her pregnancy cannot be used by him as a divorce ground. The mention of such a law probably indicates the enormous difficulties which would confront courts if they began to take a broadly generous attitude toward the annulment of marriages merely because parties err in human judgment in choosing their mates. Along this line it is surprising to note that in Virginia a man may secure a divorce from his wife because of her prostitution before marriage and in Maryland if she had been guilty of "illicit intercourse with another man." In West Virginia the wife may divorce a husband whom she learns was a "notoriously licentious person" before marriage.

Physical and Mental Defects

Most of the states make no effort to regulate the marriage of persons with physical and mental disabilities. A few states resort to the absurdity, as in Ohio, of having the license clerk ask those who apply for a permit to marry: "Are you an habitual drunkard, epileptic, imbecile, or insane person?" In perhaps five states there has been some serious effort to enforce laws requiring physical and mental fitness to marry, to be attested by a physician's examination. For some strange reason the laws in Alabama, Oregon, and Wisconsin, seem especially concerned

with the freedom of *men* from specific diseases. If accompanied by considerable educational propaganda and the wisest and fairest enforcing machinery possible it would seem that laws requiring a health certificate based on an actual medical examination should have a salutary effect. They have been in operation such a short time that it is difficult now to judge their social effect.

Age as an Essential to Marriage

Some persons are unable to give a binding consent to marriage because they lack the necessary age qualifications. The common law rule on this subject was that boys had to be fourteen years of age and girls twelve before they were able to consent to marry. Interestingly enough at common law both boys and girls had to be twenty-one to be regarded as of sufficient intelligence to make ordinary contracts concerning property. It appears also at common law that if children under fourteen and twelve attempted to marry that their attempt was absolutely void, *only*, if they were under the age of seven; if over seven they could affirm their act on reaching the age of the consent. The common law age of marriage-consent is still recognized by the courts of many states,—although it is now almost the universal rule for the American states to have

statutes which provide for the consent of parents before the marriage of children. Most of the states say that parental consent should be given for the marriage of boys under eighteen to twenty-one, and girls under sixteen to eighteen. Court interpretations have generally laid down the rule that these statutes on parents' consent are "directory and not mandatory." Unless they clearly and unequivocally show an intention to nullify the common law, they are construed as "directory." Therefore if children, under the legal age of consent, marry without parental consent and continue to live together until after the age of consent recognized in their particular state, they are validly married.

Other Legal Bars to Marriage

In the last group of legal bars to marriage a number of different circumstances may interfere with the freedom of the choice. In the first place no one may be legally married to more than one person at the same time. This may appear self-evident. But in any country where forty-eight conflicting marriage laws and as many divorce laws are possible and uncounted combinations of perversity, misunderstanding, ignorance and good faith mingle in the cases constantly before the courts, is it surprising that human intelligence is sometimes overtaxed in

the effort to do uniform and evenhanded justice? In case a husband deserts a wife and she has information that he is dead and after a great many years she marries another in good faith, she is not married, if he returns,—unless Enoch Ardenwise—he never lets his return to life be known! Nor is a second marriage good if there is a prior undissolved common law marriage existing. It is not uncommon for state laws to declare that the second marriage is not bigamous or criminal, if entered into after a period of years following desertion, or in perfect good faith. Coming down from the common law there is a presumption that one who has not been heard from for seven years is dead, and that the remarriage of the deserted spouse is valid. Naturally "good faith" is subject to proof, depending to some extent on the cleverness and resourcefulness of both attorneys and clients. So: when is a marriage not a marriage?

In over half the states attempted mixed marriages between Negroes, Indians, Chinese and white people are forbidden and invalid. When it is realized that color and appearance alone do not determine race some of the possible difficulties here may be easily imagined. In a number of states mixed marriages are also punished as crime.

Inability to bear children is not a bar to legal marriage. But inability existing at the time of mar-

riage, to perform the sexual act—impotence—may be assigned as cause for annulment, and is often, also, made a ground for divorce.

At common law persons more nearly related, either by blood or marriage, than first cousins could not marry. Until recently in England a man was not able to marry the sister of his dead wife. Most of the American states have regulatory statutes on the subject, and marriages between those prohibited from marrying because of kinship are often declared void. Suppose, however, the marriage of first cousins is prohibited in one state, but first cousins desire to marry and go to another state where there is no law on the subject, marry, and return to the first state to live. Are they married? Probably, yes, unless their state happens to be one of the states which does not recognize the marriage of its own residents in another state: Thus it would seem well for those intending to marry to be on guard and to beware, if they are interested in legality and regularity. Marriage within the law is anything but a simple matter.

VII

DIVORCE

Annulment and Divorce

When an essential element is lacking in an attempted marriage what is the next legal phase to be considered? In some cases the arrangement is absolutely void and of no legal effect, as when one of the parties to the marriage already has a legal spouse. In other cases, the union may be illegal or binding at the option of the aggrieved party, as for instance when a man marries a heavily veiled bride but discovers after the ceremony that he has actually married the sister of his fiancée. In such a case the man may disaffirm his marriage with the substitute. Or he may decide that she will do well enough, and affirm the marriage by living with her. If the man wishes to avoid the marriage he should enter a suit for annulment. Obviously this would not be necessary in a case where the attempted marriage is absolutely void. But on the ground of public policy, it is always desirable to make avoidance or disaffirmance a matter of record. The effect of a suit for annulment is to give notice to all that the marriage

is and was invalid. The effect of a decree of divorce, on the other hand, is to dissolve a valid marriage. As a matter of practice in many states, divorce has been made to cover both actual divorce and nullification. In some states, divorces may now be secured for causes existing prior to the marriage, which ordinarily would not have constituted sufficient grounds for annulment. As previously mentioned, for instance, innocently marrying a person who has been guilty of an infamous crime is not sufficient to nullify a marriage, but several states now permit a divorce on that ground. The difference between suits to declare a marriage null, and for divorce, may be shown by another example. Only a few states grant divorces on the ground of insanity. But query: if a man marry a woman so mentally diseased that she is totally unable to comprehend the nature and the obligations of marriage would he not perhaps be able to prove the attempted marriage void and gain his freedom from her by a suit to annul, even though the woman be in a hospital for the insane?

Divorce Laws All Different

There is something about the subject of divorce which stirs human passions and prejudices more deeply perhaps than any other subject in the world.

Naturally, then, there is a very wide diversity in the divorce laws of the forty-eight states. Unanimity of opinion on divorce is as improbable as agreement on theological doctrines. It seems likely, in fact, that the wide variety of legal attitudes and personal disagreements on divorce is fundamentally a matter of religious differences. He who hopes for a uniform divorce law will probably have to wait until there is again one church and one creed; or none at all.

Before the time of Henry VIII absolute divorces could only be secured in England from the pope. Then Parliament undertook to grant relief in cases of adultery. At the same time the English ecclesiastical courts had the power to give legal separations, or divorces from "bed and board." Ecclesiastical courts were never established in this country, but prior to the Revolutionary War the state assemblies of the colonies granted decrees. Legislative divorces are now prohibited but the power of the various legislatives to regulate the granting of divorces, and name or change the causes is universally recognized. A legislature was actually decreeing a legislative divorce when a sentence of life imprisonment automatically dissolved a marriage, as in Wisconsin, prior to 1909.[1]

[1] Sec. 2355 old Wisconsin Code; 90 Wisconsin 272.

Absolute and Limited Divorce

Divorce may so completely dissolve the marriage relationship or "free from the bond of matrimony" that both the parties are immediately able to marry again; as in Ohio where they may,—and do,—walk from the divorce court across the hall to another judge who may, and does,—perform a ceremony whereby new legal ties (?) are assumed. The divorce hearing and remarriage may not take more than fifteen minutes in all. Sometimes, on the other hand, the divorce decree granted in other states is said to be interlocutory and becomes final at some future date. The decree may be a limited one and merely give legal sanction to the husband and wife to live separately. These are the divorces known in law as "bed and board" divorces, and neither party may remarry during the lifetime of the other. Sometimes such divorces become absolute, if no reconciliation has taken place, on the lapse of time. Sometimes divorce decrees are granted to one of the parties who is able to remarry, at once, or in one or two years, and the guilty party may not remarry for a longer period; or at all, if guilty of adultery for instance in Virginia. Lay minds often find it difficult to comprehend how it is possible for one person to be legally married to a person who is no longer married to him, and may indeed be already

married to someone else. In such cases the answer to the riddle "when is a marriage not a marriage" is more baffling than ever. Some states, such as Ohio, have simplified the matter considerably by declaring that the procurement of a divorce outside the state which leaves one of the parties bound is itself a ground for divorce. In general, limited divorces would seem to be contrary to the desirable social policy of making the marriage relationship mutual, certain, and definite beyond question. In the United States, the power of courts to grant limited divorces is, nevertheless, generally recognized. Social workers and others interested in stabilizing marriage or in untangling domestic difficulties should always attempt to verify the fact of marriage and divorce. They should keep in mind, also, that the law of the place where the marriage was celebrated, or the divorce granted, may be,—and probably is,—quite different from the law of the place where the office of the social worker is located.

Easy and Hard Divorce

There is no natural and inherent right to divorce. That is, the right to divorce exists only as it is established and regulated by state statutes. Accordingly, the state of South Carolina grants no abso-

lute divorce for any cause whatsoever. The state of New York grants divorces for one cause only, adultery. People of means therefore go to Paris or Reno for divorce; some of the others resort to murder. An opposite view of divorce is taken by a majority of the states. Offering personal indignities which render living together intolerable or life a burden, is a ground for divorce in a small group of states. What a "personal indignity" is, must be interpreted according to the circumstances and the social status of the parties in each case. In perhaps eight states, wilful or gross neglect of duty is a ground. In several states voluntarily living apart for a specified period of years is enough. Violent or ungovernable temper is a ground in Florida. Intolerable severity is a cause in Vermont. Vagrancy of the husband may be assigned by wives who desire their freedom in Wyoming and Missouri. It should be remembered however that in every divorce case, irrespective of the language used in the state statutes, the trial judge has very broad discretionary powers and may grant or withhold a divorce as the actual facts appear in evidence and are interpreted by him, and possibly, ultimately, as the facts are somewhat colored by his own human opinion concerning the social desirability of hard or easy divorce.

Adultery as a Ground

Except in South Carolina adultery is universally assigned as a sufficient cause for divorce. There is no such universal agreement as to what constitutes adultery. Of course, in general it is having sex relations outside the marriage. In some states a single act is enough; in others there must be an actual living in adultery to give the one aggrieved a divorce. In a few states a single act of infidelity is not sufficient if performed by the husband, but is sufficient if the wife is the guilty party. In several states the adultery must be accompanied by other improper marital conduct such as cruelty or desertion. It is obvious that from the very nature of the evidence required that this cause is the most difficult of all to prove. The time and place of the act must be described and the name of the person with whom the act was committed must be stated, if known. No divorce will ordinarily be granted to a party on this ground who has himself been guilty of the same kind of conduct.

Criminal Conduct

Conviction of a felony, imprisonment in a penitentiary, imprisonment for a term of years, fleeing from justice, are other very common grounds for

divorce. In a few states divorces are granted for conviction of crime prior to marriage, if unknown to the other.

Extreme Cruelty

Extreme cruelty is also made a ground for divorce in most of the states. As a rule, this cause may be assigned by either husband or wife as a cause for divorce, but one or two states unfairly enough extend the ground to wives, only. Interpretations of what amounts to cruelty widely differ. By the weight of authority personal violence is probably meant. Other courts hold that physical abuse is not necessary if living together is made intolerable by profane and abusive language. This means substantially that causing mental suffering through offensive language may be a ground for divorce. Many courts, however, hold that vile and abusive language must be so constant and extreme that the physical health of the one abused has actually been impaired. The social status, the degree of education, and the culture of the parties, therefore, really is a legal issue.

Is Nagging Cruel?

Among some social classes, particularly among the more ignorant foreign groups, the wife expects to be treated as a beast of burden and to be talked to by her "man" with profane contempt. It might be very difficult in these cases for a wife to gain her freedom. False and malicious accusations of want of chastity unless coupled with other reprehensible conduct, as a rule, will not be sufficient grounds for divorce unless the health of the one accused has suffered as a result of the accusations. In Louisiana "public defamation" is specifically named in the statute as a divorce ground. Unnatural practices, immoral habits, subjecting a wife to excessive sexual intercourse, infecting with a venereal disease, unless done innocently, may all be actionable cruelty under some circumstances. A few states name disease as a special ground for divorce, for instance, Illinois, "infecting the other with a communicable venereal disease"; Delaware, "contagious disease at time of marriage"; and Kentucky, "concealing a loathsome disease or contracting it afterward." Cold, harsh, unfeeling demeanor, nagging and scolding, rudeness, cursing and fits of temper are not as a rule extreme cruelty. Nor will the courts grant relief to those who have brought cruelty onto themselves because of their own misconduct.

Sexual Incompatibility

There is a difference of opinion as to whether denial of marital relationships, unaccompanied by other aggression or impairment of health, is legal cruelty and a ground for divorce. There is also a conflict of opinion as to whether prolonged withdrawal from conjugal intercourse amounts to technical desertion. Some courts have held that it is not gross neglect of duty. As a matter of sound social practice it would seem that if there is a persistent refusal to live together, without adequate reason, that the one aggrieved should have legal redress. Several states grant divorces to those who have lived separately for five, seven or ten years. The difficult cases arise where the parties have lived in the same house but not as husband and wife over a period of years; or have separated because of disagreements over sex. Social workers and others who are brought into intimate contact with the problems of people are sometimes inclined to believe that sex incompatibility is at the bottom of an overwhelming percentage of all cases of divorce and domestic inharmony. Sex education, medical examination and treatment, case work generally, are at least as necessary to any real solution of the problem, as divorce.

Desertion

Another very common ground for divorce is desertion. By desertion is meant a wilful, intentional separation of husband and wife for a prescribed period of one, two, three, or five years. Whatever the time required by the statute, it must be continuous and unbroken. Desertion or abandonment cannot be claimed if a man is unavoidably away from home because of business, confinement in a hospital, or service in the army; nor if a wife goes away because of the actual or legal cruelty of her husband or for other justifiable reason. As a rule, separation by mutual consent cannot be claimed by either party as desertion. As the husband has the right to select the place of the family home it is the duty of the wife to follow the husband as often as his fancy turns to a new adventure. The refusal of a wife to accompany her husband to a new domicile amounts to her desertion of him. If her health and safety would be endangered in the new location she may safely refuse to go; probably also she is not required to go to a foreign country to live. There must be a head of the house and the law says, everywhere, that the man is that head, even though it sometimes happens that the wife has better judgment on matters of family finance and family welfare than he. Fortunately, in the majority of mar-

riages husband and wife continue to reason together, and settle such questions through mutual affection and respect, and not by recourse to their abstract legal rights.

Nonsupport

In possibly a third of the states, nonsupport of wife is ground for divorce, notwithstanding the ability of the woman to earn her own living. So long as the wife must follow the husband and he need not follow her,—although she may be able to earn more in one city than in another, and more than he in any city,—the rule seems fair enough. As women increase their opportunities to earn it is not improbable that they will cease expecting special legal protections and be unwilling to be supported by men in idleness. . . . Already several states seem to recognize the right of a husband to legal support from his wife under some circumstances. . . . How abundantly and luxuriously the husband must support the wife depends, as a rule, on all the circumstances of the case, the social rank, the education, and the income of the parties.

Drunkenness

Another ground for divorce is habitual drunkenness. The habit must be one acquired after marriage. Marrying men to reform them of drinking is not therefore encouraged by the law. Occasional sprees are not to be regarded as grounds. There must be a regular and persistent state of intoxication. Constant drinking, unaccompanied by intoxication, has never been a ground for divorce. Whether constant drinking and association with bootleggers in a legally dry state will give rise to any new rules is not stated. The use of drugs is less frequently a ground for divorce.

Defenses

In the trial of a divorce it is always a defense to show that the facts alleged are not true. Or if a party knew of a condition before his marriage he cannot afterward assign that condition as a ground for divorce.

Condonation, Connivance, Recrimination, Collusion

In general any misconduct which has been forgiven, or condoned, cannot be a proper ground for divorce. But in law, forgiveness is always presumed

to be conditioned on future good conduct. Continued improper conduct revives forgiven offenses. Also giving consent to improper conduct takes away the right to complain of the conduct afterward and ask for divorce because of the conduct. For instance if a husband connives at the immorality of his wife he is barred from a divorce because of her infidelity. By a principle known as recrimination, a party who has himself been guilty of actions constituting a good ground for divorce is not permitted to allege the improper conduct of the other as a valid ground for divorce. In other words, divorce is a protection for the innocent and not for the guilty. "He who comes into court must come with clean hands." If both parties are equally at fault, both guilty of adultery for instance, the court should leave them where it finds them. If it is apparent that the parties can never live harmoniously together again, and the greater preponderance of guilt is on one side, the court may grant each a divorce. Granting divorces to parties who have been working together to that end is bad law. But unless the court has proof that they are conspiring together and that the court is being imposed on, what is to be done? Jointly suppressing facts, or making up facts in an effort to impose on the court is called collusion.

Incidents of Divorce Trials

A court does not have the power to grant a divorce unless the parties are legally before it. This means that the power of a court to hear divorces must be given to it by special state law. Also this means that a petition alleging a sufficient ground for divorce must be properly filed by a plaintiff who has a legal residence in a state; the defendant must also be present in court or at least he must have been duly notified of the suit. The general rule is that the plaintiff must have lived in the state one full year before he may ask for a divorce. Married women are permitted to acquire a separate residence for the purpose of securing a divorce. In some states there is a two year residence rule; three and even five years of residence is required in a few places. The three months' residence requirement in Nevada has made it pleasant for plaintiffs who have little time to spend in regaining their freedom. If the address of the defendant is known he must be personally notified; in some states he must be given a copy of the petition as well. Most of the states permit notice by publication to a defendant who is out of the state, or whose address is not known. The notice by publication is made by inserting a printed notice in a newspaper of general circulation. It may be easily seen that a plaintiff may claim not

to know where the other party is, in order to avoid a contest. To prevent this and other frauds it would seem desirable for all courts to make some independent investigation of divorce petitions, as is done in Cleveland, Ohio, for instance. Investigation has the added value of increasing the time between the filing of the petition and the hearing, and in other ways encouraging the possibility of reconciliation. Further than this, there is a legal unwillingness, based on sound social policy, not to set aside divorce decrees, once they are granted. Many authorities feel that a divorce judgment should never be set aside unless the request is made at the same term of court. Other states do not permit a general judicial review of a divorce proceeding in an upper court and new trials are always regulated strictly by state statute.

Divorce Decrees

At the discretion of the court, an order for costs may be included, with the divorce decree. In some states under common law, and in others under statute, counsel fees may be awarded the wife. In effect husbands may be required to pay for the prosecution of themselves. Pending the trial of the case an order for temporary alimony may be entered. "Permanent" alimony may be included in the final

order for the wife, although several states have extended the right to the husband also. Property rights generally may be settled in the divorce decree and the parties have the right to ask the court to approve any settlement which they have mutually agreed on, outside of court. The court may also ratify an agreement of the parties concerning the custody and support of their children or enter such order as may, under all the circumstances, seem fitting. Support and custody orders may be modified, by the divorce court, from time to time as the circumstances change and warrant. Failure to obey an order of a court is contempt and it is a great pity so few divorce courts have provided adequate machinery for enforcing orders for the support of dependent children of poor mothers. Married women probably have the right, informally, to reassume their maiden names after divorce, or courts on request may include the change in name in the formal decree which becomes a matter of public record.

VIII

THE NATURE OF LAW AND THE STATUS OF MEN AND WOMEN

How Powerful is the Law?

Law has the form and the force which we, the people, give it. Those who know nothing about law often have a superstitious fear—or reverence—for it. Vainly they imagine that everything is possible in the law; and that the law makes everything possible. This childlike attitude is at the root of the American habit of passing laws on every conceivable subject under Heaven above. The total volume of law is so huge, it is all in such a state of flux, that no one can know it all; nor can any community enforce all its own legal efforts to regulate private morals and conduct. Which explains in part at least why we lead the world in lawlessness. Relief from the situation would follow, doubtless, if it were possible to get over to our free and sovereign people a proposition which seems almost self-evident. Of itself, law possesses no innate nor miraculous power. Legal words and phrases in themselves can do nothing. Saying, that all men

are created free and equal does not make it a reality. Saying, that the husband is the sole and absolute head of the household, adds little to his prerogatives, as every husband and wife know. Saying, that men and women shall be equal before the law does not make it so. In other words, law is a social sanction, an agreement of people to act together, for certain purposes, under some conditions. Human emotion and opinion can never be eliminated from its operation. Furthermore, the natural laws of biology continue to set distinctions among people and make differences between the sexes, however anxiously we may attempt to avoid that conclusion.

Law Reflects Social Thinking

To put this in another way: In this country law and law enforcement is the expression of the will of the majority—or of that fraction of the people who care enough to vote. Law then, has only the power which the people elect to give it. They cannot give it more power than they themselves have to give. The result of this is that the law expresses the moral standards and the social philosophy of the people, but often lags far behind in making changes because the people fail to register an adequate or prompt expression of their own changed opinions. All this is true in every division of law.

Whenever the subject of the legal status of women is approached it needs an energetic restatement. Probably no one denies that some of the apparent differences between men and women will tend to disappear with an equalization of environmental background. Probably, also, there are structural and emotional differences existing from birth, or before, which will persist under every social readjustment. Some argue that a 20th Amendment to the Federal Constitution by some unknown alchemy could bring men and women to an equal dead-levelness of opportunity. Why this would seem desirable, even to the handful who are agitating for the amendment, remains an unfathomable secret. For it would seem that on sex differences much of the ultimate perfectability of society depends. If it were possible to produce artificially greater variety and originality in sex characteristics, it would be less difficult to build up a supreme social whole where every part mutually complements the needs of every other part. But man-made law cannot make men and women equal and the same. Law can and should recognize the differences and give to each sex the exact protection which its highest development and peculiar needs demand. That is what the law has always tried to do, feebly, clumsily, ineffectively, yes all that, and in our very

modern eyes,—sometimes brutally and unfairly,—yet ever reflecting definitely and inexorably the will, the desire, and the social thinking of the people. . . . And women have always been people.

How Remove Inequalities?

"No man is justified by the law in the sight of God." To condemn the common law for its harsh disregard of the rights of women is to condemn merely the ignorance and the stupidity of the social period which produced it. To rail at the legal inequalities which remain is to mock ourselves. Men are incurably chivalrous—the ease with which they acquit murderesses proves that;—had women in sufficient numbers asked for fundamental changes in the law long ago, they would have had those changes long, long ago. To this day it is doubtful whether most of the women of the country want to vote. As soon as a small but militant group of suffragists raised their voices above a whisper, the 19th Amendment was added to the Federal Constitution.

The Proposed 20th Amendment

Political and legal inequalities which remain in American law are being gradually removed, one by one, as those who are being discriminated against

arouse themselves to action. Unquestionably this method is based on common sense and sound legal reasoning. To expect a so-called Blanket Amendment to the Federal Constitution to catapult American women into a state of economic and social perfection is contrary to all human experience. If an effort to make men and women "equal" were to be made by law, would the position of the man, or the position of the woman, be taken as the abstract standard; or would every case have a different outcome depending on the attitude of individual judges? Let us ask no more impossibilities of our courts.

Law the Basis of Happiness?

Since the rise of the modern movement for woman suffrage it has become the practice to compare the condition of married women under the common law to virtual human slavery. True the legal existence of a woman was suspended during marriage. More accurately, her legal entity was simply merged in her husband's; or as the old books so neatly put it: Husband and wife were one and he was the one. Most of the common law rights of husbands were a logical corollary of the legal fiction that there was a complete unity of personality and interest between husband and wife. The desirability of such

marital harmony then—and now—is obvious. This may be heresy: nevertheless, how do we know that married women under the common law suffered more unhappiness and unrest than modern women? On the other hand, it is quite safe to state that such unhappiness as married women suffered under the common law had little or nothing to do with law. Married women were happy and successful then—as now—for much the same reasons. They chose their husbands wisely; they had patience and tact and were sometimes blind and deaf and dumb; they had good health; they kept themselves active and interested in their homes, husbands, children and the world in general; they adapted themselves to changed conditions as often as it was necessary. This is not an argument for a return to common law by any means; it is an explanation of the nature and the limitations of all law. Our grandmothers and all our female ancestors before them may have been quite miserable, but if they were, 'tis extraordinary that they said so little about it, and left so few records of their suffering. With our marriage and divorce ratio running from 12 to 1, 7 to 1, 5 to 1, 3 to 1, and in some places actually 1 to 1, what do we know of domestic harmony, and how shall we compare it to any other time?

IX

HUSBANDS AND WIVES THEN AND NOW

Although the modern suffrage movement has undoubtedly tended to overemphasize the hardships suffered by married women under the common law —and the joys which the ballot would bring—there is at least this to be said for it: The legal status of men and women under common law and modern statutes is probably known to more people today than any other branch of the law. Knowledge of law is so rare that this is a real tribute to the energy and ability of the women who have worked in the suffrage organizations and in the League of Women Voters. A statement of the subject, not as equal rights propaganda, but from a legal standpoint, still presents some interesting aspects.

Wife Beating

In the old days the husband had the right to chastise his wife but "with a stick no thicker than his thumb." "The lower ranks of people, who were always fond of the common law still claim their ancient privilege," says Blackstone. Courts in this

country have never shown much enthusiasm in upholding the husband in this ancient privilege. But Cooley, in "Torts," quotes from an early North Carolina case as follows: "Although the laws of this state do not recognize the right of the husband to whip his wife, yet courts will not interfere to punish him for moderate correction of her, even though there had been no provocation." Cooley could not resist adding, "One is naturally a little curious to know what can be moderate correction when there has been no fault." It would seem the overwhelming modern rule that the husband can only restrain his wife when it is absolutely necessary to prevent her from committing a crime, or an adultery, or from interfering with him in the proper training of their children in the few states where he is still the sole and absolute guardian. In general, the law now says that a husband who strikes his wife is guilty of the crime of assault and battery. In about forty of the states the wife may, in addition, assign the assault as cruelty and ground for divorce. It is amusing to note that apparently in three states the wife may strike her husband without fear of divorce by him on the ground of her cruelty, though she may use that ground against him! It is only necessary to add that the abstract right of a husband under common law to administer moderate corporal chastisement to his wife never caused a husband to

beat his wife; nor is the legal denial of this right in husbands today much protection for the wives of brutal and sadistically inclined men. The police courts, the courts of domestic relations, and the divorce courts of the United States hear the cases of thousands of women every month who swear under oath to the contrary.

Contracts and Suits

Husband and wife under common law could not contract with each other. They were one person and the wife was completely under the influence and domination of her husband: at least this was the legal theory. For them to make valid contracts with one another, therefore, the intervention of a third party or trustee was necessary. Although equity would give effect to postnuptial settlements between husband and wife which were otherwise valid—not contrary to the rights of creditors for instance—a common law gift of personal property from a husband to his wife was void. He could not even make a valid gift of her own earnings to her. Probably in the majority of states this rule is now otherwise. It appears that wives could always make valid gifts to husbands! Also married couples could not legally be business partners, nor could a married woman be the partner of anyone else. And

it seems that these handicaps still prevail in some states. Because the legal existence of a wife was suspended, it was formerly as impossible for her to enter into an independent contract as it still is for a child. She could not sue nor be sued in court. In many cases all this worked a grave injustice to women. On the other hand it was not always an unmitigated disadvantage to a married woman who wished to use her peculiar position to defeat the rights of other people. Sometimes it must have been a hardship also for men who were unable to deal safely with women even where it would have been mutually profitable. The right of a husband to contract with persons outside the marriage relationship, and to sue and be sued was not affected by his marriage. Unless specifically changed by modern state statute the old rules still prevail. In about twenty states married women now have substantially the same right of contract as married men. In all but nine states there is a statute giving wives the right of contract, with some limitations. In community property states the husband has superior contractual rights in reference to the community property, and in perhaps eight states married women are unable to make contracts of surety or guaranty. In no jurisdiction are modern women denied the privilege of suit in connection with their separate statutory estate.

Crimes

Then, too, when a married woman committed a crime, if her husband was present or near, there was at least a presumption in her favor. That is to say evidence had to be produced to show that the husband did not direct the act and really was not the guilty one! However it was always possible to show that the woman acted voluntarily! There never was a presumption that a wife influenced her husband to commit crime; although it is reasonable to suppose that sometimes this happened. Because of the legal unity between husband and wife neither could—nor in general can—commit property crimes against the other. How can you steal from your own self? Can it be arson to burn your own property? Naturally because of the peculiar relationship between them neither may commit certain sex crimes against the other. The rules on crimes between husband and wife have been modified in some places. It is clear, beyond any reasonable doubt, that either may be guilty of assault or homicide against the other, any place!

Women as Free Moral Agents

Once when a woman injured other people by assaults, slanders and so on, either before or after

marriage, her husband could be held for the pecuniary damages she had caused. This liability of the husband arose whether or not he had received any property from his wife. In the cases where it was shown that she really had acted free from his domination she could be held jointly with him. Husbands are no longer liable for the private injuries committed by their wives *before* marriage. But, unless the common law has been specifically changed, the general liability of a husband for injurious acts of his wife probably continues. Of course in some states married women have been made solely responsible for their own voluntary acts. Since the enfranchisement of women it would seem that on a common sense basis courts should hold women as free moral agents. However, it has been held in some cases that it is the duty of the husband not to permit his wife to sell liquor in the family home and that he may be liable for her liquor sales in his absence and without his consent! In general neither husband nor wife may hold the other in damages to this day, certainly not unless there has been express statutory authorization. On the ground of public policy changes here should come slowly indeed, if at all. Women have attempted to collect damages from husbands who injured them by reckless driving of the family automobile, but properly, in vain.

The Husband the Head of the Home

The husband was and is the head of the family with the right to choose and change the location of the family home. The refusal of a wife to accept the decision of her husband on this issue amounts to her desertion of him. No other rule would be consistent with the absolute responsibility of support which the law continues to place on the husband.

The Wife's Name

It has been customary for the wife to assume the name of the head of the family. It is easy to see how this would be the easiest and simplest rule for her to follow. After all any name may be obtained by reputation and there is no legal objection against married women, if they find it convenient, to be known publicly by one name and privately by another. Courts have never said that Mrs. John Jones is the legal name of Mary Smith Jones. Marriage confers a new name on the woman only if she cares to use it, or the man may adopt the woman's name. On this matter as on so many matters under the head of domestic relations, private adjustment and personal taste may achieve almost any desired outcome.

Independent Citizenship

By common law the citizenship of men and women was not affected by marriage. In this country laws have been passed which have conferred American citizenship on foreign women who married American men, and denied citizenship to American women who married unnaturalized foreigners. Since 1922, the right of married women to independent citizenship has been recognized. A woman's citizenship now seems to be unaffected by marriage except when she marries a foreigner who is ineligible to naturalization under our law, or when she continues to reside in the foreign country of which her husband is a citizen. Some difficult cases have arisen even since the passage of the Cable Act where women who had lost their American citizenship prior to 1922 by marrying foreigners are unable under the quota provision of the immigration law, to return to the United States. Some foreign countries also have the rule—once the United States rule—that a woman loses her citizenship by marrying a foreigner. A woman of such a country is literally a "woman without a country" until she has been naturalized in the United States.

Encouraging Marital Friendships

As a rule neither husband nor wife have been nor are permitted to be witnesses in court for or against each other, concerning a communication made by one to the other, or concerning an act done by either in the presence of the other. This is intended to safeguard the sacredness of the marriage relationship. However, it is held that if a third party is present the communication is not to be regarded as confidential and privileged; and when either party is accused of a crime against the other domestic harmony is not thought to be destroyed merely by permitting the one injured to testify.

X

MORE ABOUT HUSBANDS AND WIVES

Property Rights

Formerly the husband became the absolute owner of all the personal property which his wife owned on marriage. She acquired no corresponding right in his personal property. There was one apparent exception to the rule that the husband took everything his wife owned on marriage. If he failed to exercise his ownership over her clothes and personal trinkets, they remained hers on his death. The husband assumed with this privilege of property a liability for all the antenuptial debts of his wife. As a matter of fact though, he was liable for the debts even when she brought no property to him on marriage. All this has been very generally changed by statute but it has been held in some states that the liability of the husband for his wife's debts contracted before marriage is not removed merely by the statutes which give her the right to hold her own property. The husband also had the right to the use of all his wife's real estate; he could collect her rents and dispose of her leases. At her death he still continued to enjoy all her real property for the

remainder of his life, as a tenant by the courtesy but only if his wife had borne him a child. Irrespective of the birth of a child a wife had a one-third interest, or dower, in her deceased husband's real property and also a right to a third of his personal property. Courtesy and dower are still valid in seven American states. In some states courtesy is abolished and dower survives. In some states one-half, or all, the property of a deceased husband or wife goes to the survivor, if there is no will. In twenty-five states husband and wife have equal property rights. Under modified forms eight states hold that all property acquired during marriage, except possibly by gift, by either husband or wife, belongs equally to both. Such community property was unknown to the common law. Generally all property owned prior to the marriage remains the separate property of each. Earnings of either husband or wife, under community property statutes, belong jointly to both, although in one or two states the earnings of a wife living separate from her husband are hers. The husband has superior rights of management and control over all such property.

Sex Discriminations

Now that women have the same voice in law-making as men they have only themselves to blame if

there are unfair sex distinctions in the law. The truth is some of the "discriminations" which remain unreasonably favor women and are legally illogical. Statutes which have modified the common law position of women in some respects have not by implication destroyed all the common law liabilities of married men. It has been repeatedly held that modern statutes which change the common law are to be strictly construed so that it is perfectly possible for a woman to retain the control of her own fortune—while at the same time her husband is liable for her damages and for her entire support. Again, in only about half of the states are women subject to jury service. This is an important governmental responsibility which many women—as well as men—seem willing to avoid. Women members of a state assembly have recently voted against the extension of jury service to the women who voted them into office on the ground that women would find the "duty a burden" and "too much for their sentimental and illogical minds"![1] Of course, such arguments are embarrassing to the fairminded women of the country who dislike to use their sex as both a shield and a sword.

[1] Virginia.

Pay for Wives?

The husband was and is entitled to the unpaid personal services of the wife in the household or family business. There seems to be a growing dissatisfaction among women with this condition. Surely the less said about the matter the better, unless women are willing to forfeit the right to support. Indeed, the problem of pay for wives, or spending money for husbands, is not one which would seem to lend itself appropriately to legal enactments but should be left to private agreement, based on mutual affection and sense of fairness.

Wives' Earnings

Based on the right of the husband to his wife's services and his liability for her support was his right to collect and control her personal earnings. At common law payment of her wages to a working wife did not discharge the employer's debt to the husband. In the days when no one thought it wise or necessary to educate girls, and almost no business nor professional opportunities were open to them the right to collect a wife's wages was not the valuable perquisite it would be today. Most states have changed the rule although in several states in-

cluding most of the community property states a husband may still control his wife's earnings.

The Husband Must Support

Nothing is clearer than the legal necessity of a husband to support a wife both at common law and under modern statutes, although at common law it does not seem to have been a *crime* for him to neglect to support her or to abandon her. Irrespective of her ability to support herself the husband must support his wife. If she has committed adultery he probably need not continue to support her. In two or three states there is a mutual obligation to support, with the husband's liability remaining primary of course. Non-support is sometimes a crime and there has been some agitation to make the abandonment of a wife universally an extraditable offense. When there are no children and the wife is able to work it would seem difficult to sustain the logic of this position today. To be entitled to support the wife must remain in the husband's home, if he wishes that, unless he has forfeited the right to have her there by his own misconduct.

How Many Clothes?

By support is meant, in general, the right of a wife to have all her "necessaries" paid for by her husband. Necessaries is an elastic term and varies according to the income and social position of the husband. Food, clothing, shelter, medical and dental attention and household furnishings are all necessaries. The husband is liable for the value of necessaries sold his wife over his protest, if he has himself failed to provide her with proper support. Naturally this does not mean that a husband must pay for all the clothes his wife may buy. If a husband has already furnished his wife with such clothes as are proper for a woman in her position, and he has expressly told her not to buy more, a merchant who has never sold to the wife before would have difficulty in recovering from a husband. In other words if a wife owns a suitable fur coat a merchant could not recover from a husband on a new account for a second fur coat. The rule would be the other way if the husband had authorized the purchase or has been in the habit of paying a given merchant without question whenever bills are presented to him for his wife's purchases.

Notices in the Paper

Therefore, a notice in the newspaper reading that a husband will no longer be responsible for the debts of his wife is not the protection which many people imagine. A husband must support his wife and cannot avoid his legal liability merely by saying that he does not intend to pay her bills. If a husband has made proper provision for the support of his wife the notice should protect him. If the wife is living with the husband there is a presumption that she may bind her husband's credit for necessaries. If the articles purchased by a wife are necessary for her health and comfort and a merchant has been in the habit of dealing with her and sending the bills to the husband a mere notice in the paper will not defeat the right of the merchant to recover from the husband. If the husband and wife are not living together through no fault of the wife, and the husband has failed to support her, in spite of a notice in the newspaper he is liable for her necessary purchases. In every case the object purchased must be a necessary according to the status and the condition of the parties. Recovery from the husband depends on all the facts and circumstances in each case.

Wills of Married People

In the days when a woman lost her personal property and the control of her real property on marriage, it was logical that her will made before marriage should be revoked on marriage. As marriage did not disturb a man's property rights his will was unaffected by his marriage. But his marriage and the birth of a child would revoke his will. Under modern statutes a married woman is generally permitted to make a will, certainly in reference to her separate property. In some states the will of either a man or a woman is revoked by subsequent marriage. In many states the birth of a child revokes a will, as to a child born after the will is executed, unless the intention to disinherit the child is clearly shown. Formerly the husband was the sole guardian of the children, but at common law he had no right to appoint a guardian for them by will. By an early English statute, he was given the right to make a will, or deed giving away *his* children, both born and unborn. In this country this same right was extended by state statutes, but now exists in only one or two states, unless the wife consents. It is highly improbable that any state would today give effect to this technical right of a father contrary to the welfare of the children. The modern tendency is to recognize that a woman should have

much greater rights in her children than formerly and many states permit a surviving wife to appoint a guardian for her children by will. In thirty-eight states husband and wife have been made equal legal guardians of their children. But it has been held in some cases, that the co-guardianship laws alone do not confer on wives a right to make wills concerning their children. Questions concerning husband and wife as father and mother will be discussed later.

XI

THE CHILD AND HIS PARENT, IN LAW

It is Always Age vs. Youth

From the beginning of time it has been hard for the middle-aged to bridge the chasm to youth. Forgetting their own delinquencies, Adam and Eve were doubtless puzzled as to how they ever could have produced their delinquent child, Cain. In our own day the difficulties of the older generation in keeping sympathetic touch with the younger set may be greater because all life is changing faster than ever before. But, naturally and inevitably, age will criticize youth and youth will be impatient with parental overlordship, as long as progress continues to plunge each new generation into new and original phases of life.

Children as Chattels

Among primitive tribes of ancient and modern times, parents *own* their children, legally. They have the power of life and death over them. They sometimes hire them out in prostitution; and give

them—especially the girls—into forced marriage. Parents have been able to make their children work for them as unpaid servants, and still may—and do—for that matter. They have had the right to mutilate their children for effective begging; in spite of the law children are still the tools of parents' begging schemes in almost every city in the country. Killing unwanted offspring; offering them as sacrifices; abandoning, selling, pawning them has left a bloody trail around the world. And that trail is still wet, as every social worker in the land knows, with the blood of American children who are abandoned by the thousands every year and who are given away for adoption, or placed out, with as little formality as unwanted puppies are disposed of. There are thousands of parents—really throwbacks to the days of savagery—who still attempt to exercise complete domination over the *personalities* of their children. At least part of our so-called youth problem arises from the fact that a good many modern parents do not know that they are no longer, legally, the sole and absolute guardians of their children in the United States. In our civilized society, the state, for the protection of the child, is his ultimate guardian. In its capacity of *parens patriæ*—parent of the country—the state may assume the control and custody of any child who is in need of protection and care against its

parents or others. The direction of the lives of children, by the state, must be carefully restricted, but in a democracy, with both fathers and mothers voting, the legal safeguards are ample, of course. The greatest trouble in the legal field of parent and child is too much of the attitude that natural love and affection are *sufficient* protection to the relationship. Nevertheless, indigent parents whose children refuse to assist them are known to us all; and the thousands of children before the juvenile courts of the country, every year, as neglected, abandoned and dependent are at last arousing serious doubt as to how far natural ties have ever protected.

Who is an Infant?

At common law anyone under twenty-one years of age was an "infant." This is still the law for boys, but girls in many places now cease being "infants" on reaching their eighteenth birthday. Surrounding "infancy" or minority the law has built up certain privileges and liabilities, with corresponding rights and duties in parents and others. The part which the law plays, or may play, in protecting infancy and in regulating the relationship of parent and child concerns in a very intimate way every one of us.

The Father the Natural Guardian, in Law

Perhaps the most fundamental right inhering in a parent is his right to the custody and control of his minor children.[1] The English common law gave this right primarily to the father, then to the mother on the death of the father. In this country it would be difficult to find a case, even before the passage of the co-guardianship laws, where the right of the father was ever permitted to interfere with the well-being of the child. There are still ten states where the mother is not yet legally recognized as an equal guardian of the children with the father. There has been and is much earnest propaganda directed at this unfairness in the law. The principle of equal guardianship in the father and the mother is sound, of course, and surely no modern-minded person could be against it. On the other hand, there has been much less legal necessity for the change from the sole guardianship of the father, to the co-guardianship of the father and mother than some of the ardent supporters of the measure have realized. Everyone knows that when a man and woman are living together under average harmonious conditions, the question as to which has the more legal authority is not a practical issue. When a man and woman are separated, although the father has had

[1] Illegitimate, adopted, and stepchildren will be discussed later.

the primary right of guardianship, courts have considered the welfare of the child and the circumstances surrounding each case, the age, sex, health, of the child; and the feelings, character, education, wealth, health of the contending parties.

The Child More Important Than the Parent

When old enough to have a preference, the child's own wishes are also considered; if the child is over fourteen he may usually decide the question of guardianship for himself, if he selects a suitable guardian. As joint legal guardians, a father and mother will have to act in harmony,—just as before. If either one attempts to act in defiance of the wishes of the other, courts will continue to protect the well-being of the child,—just as before. A guardian has the right to direct the religion, education, and training of a child. In general, when the father was the sole guardian his wishes in these matters ranked ahead of the mother's but whenever family quarrels have reached the courts, an intelligent preference of a child and his welfare have been regarded as paramount. How parents of opposite religious faith may be given equal rights, as a matter of practice, in training their children in conflicting creeds remains to be seen.

The Loss of Custody

The right of parents to the custody of their children may be taken away, permanently or temporarily if it is shown in court that they are utterly unfit guardians. No other rule could possibly be followed if childhood is to be safe. Poverty alone should never be interpreted as unfitness. But it must be admitted that mothers' or parents' pensions, and private relief are pitifully inadequate to supplement the low and irregular wages of many widowed mothers and American working men. If parents abuse, neglect, wilfully fail to provide for, or surround their children with immoral conditions, the well-being of the children makes a change in legal guardianship imperative.

Regaining Custody

Accordingly, courts have the power to interfere in all such cases and should not hesitate to act. It should be emphasized here however that changes of custody should be based, always and with no exception, on thorough social investigation made by trained social workers, legal notice to all parties concerned, and regular public hearing. Usually changes in such court orders may be made as changed conditions justify but again new orders

should be entered cautiously and after re-investigation. Through a writ of habeas corpus a parent may regain the custody of a child which has been illegally taken away, always. . . .

Surrendering Children Not Favored

Parents may voluntarily lose the custody of their children by abandoning them; also by private agreement, or by surrendering them. Very properly, courts do not look with favor on the agreements of parents to relinquish the custody of their children. By the weight of authority, voluntary surrenders of children are not binding on parents who make them and then change their minds. Courts will regard the surrender as valid, when made in writing and in a binding form; when it has been acted on and an actual change of custody has occurred—if again —it is for the best interest of the child not to disturb him. The effect of a legal adoption will be considered later.

Supporting the Child

The primary responsibility for the support of a child is on the father, and after his death, with some limitations, on the mother. Statutes in some states require a mother when able to assist in the support

of the children, if the father is living and unable to support them. There seems to be some uncertainty whether a parent at common law was under a legal or merely a moral obligation to support his children. The question is sometimes important in states which do not have statutes which cover all aspects of support, broadly. In the absence of statute, the common law governs, of course. By a law passed in the time of Queen Elizabeth [2] it was enacted in England that the father and mother, grandfather and grandmother of poor, old, blind, lame and impotent persons should support them, if able, but that no person was bound to provide for his children unless they were impotent, unable to work through infancy, disease, or accident, and then only as to necessaries —food, clothing, shelter, medical attention. This statute is probably old enough to be regarded as part of the American common law. This is clear: If a father has the custody of his child he must maintain him; and in many states if a father has abandoned his child, anyone else may support the child and recover from the father on his implied legal promise to pay; in addition, most states make it a felony to fail to support a minor child. In some states a person who spends money caring for the minor child of another cannot recover unless there has been an actual contract to pay. Strangely enough, an aban-

[2] 43 Eliz. C. 2.

doned wife, as has been already pointed out, may bind her husband's credit for her necessaries.

Children May be Disinherited

The law does not require parents to leave property to their children by will but if a parent die intestate, the children inherit subject to the rights of a surviving husband or wife. Usually the obligation of a father to support his child continues until the child is able to support himself, or reaches his majority, or the time mentioned in the statute, often sixteen years. In some states special statutes require parents to support adult children who are mentally or physically unable to support themselves. Parents, on the other hand, have no rights in the independent property of their children except their earnings.

Rich Children

If a child has wealth of his own the father cannot use it even to maintain the child, without a court order; and usually a court will not permit the child's property to be used for his support unless the father is able to show that the child is richer than he is and that he is unable to support the child adequately. The mother of a rich child is given more liberty in

spending a child's property for his support. A parent has the right, generally, to say that he will only be responsible for the support of his child if the child remains at home. However, if a parent has lost the custody of his child because of his own misconduct, he may be required to support the child wherever the child is placed. For instance, if a divorce decree has given the custody of a minor child to the mother, the father may still be held for the child's support. And as mentioned before it is contempt of court for a father to fail to obey the support order of a divorce court.

Must the Child Support the Parent?

At common law there was no legal duty resting on a rich or an adult child to assist in the support of his aged or sick parents who were unable to care for themselves. Many states now place such a responsibility on children, with varying limitations. The support of aged parents by financially able children is, however, far from being as well established legally as it should be. The mounting bill for charity in this country should suggest perhaps the need for such a law in all the states.

Legal Settlement and Child's Support

As a rule, a poor person is entitled to receive support from the public in the place where he has his legal settlement or residence. Legal residence may usually be defined to be the place where a person has his fixed or permanent abode for one year—sometimes longer—and the place which he regards as his true home and to which he expects to return when away. Where is the domicile of a child established? A legitimate child has his legal settlement in the place where his father has his, and a child is unable to acquire a new settlement for himself. After the death of the father, the mother when a widow, may acquire a new legal residence and give her minor children a right to support in the new place. It is important for those who are administering charitable funds to remember that a minor child does not acquire a new residence through a stepfather, but retains the residence already gained through his own father or widowed mother.

Child's Work and Wages

When the father was the sole guardian of the minor children, he had the right to have them work for him; and if they worked for another to collect their wages. The creditors of a father could thus

levy on the earnings of a child. This remains the legal rule, although about one-third of the states now recognize the legal right of the mother to share in the children's earnings. A child may control his own wages if his father has failed to support him, or has abandoned him, or has agreed to release him from parental control, or has shown by his conduct that the employer may safely deal with the child. If a child is legally married,—and it has already been shown that sometimes a child may be legally married without parental consent,—the parent also loses his right to collect the child's wages. It is obvious that when parents have properly supported and cared for their children that they will rarely find it necessary or advisable to resort to court action to enforce their legal right under this head. In other cases, courts often find that the welfare of children requires that they be given reasonable spending money. Whether they work or go to school the social advisability of spending money for children has frequently been insisted on. Among some of the foreign groups, family discord and probably even juvenile delinquency has been caused by parents who stand on their legal rights and insist on receiving the unopened pay envelopes of their employed children.

The Adult Child at Home

If an adult child remains at home and works for his parent he cannot recover for his services unless he is able to show an actual agreement that he was to receive wages. Cases are often coming before courts for interpretation under this rule.

The Parent: Guest or Boarder?

Conversely, children sometimes try to recover for what it has cost them to board their aged parents. The courts hold that if a parent is a member of a child's household there can be no recovery by the child against the parent's estate, unless, again, there was a contract between them.

Recovering for Injuries to the Child

If a child is carelessly run over by an automobile or train what is the legal recourse? Based on the right to a child's services and earnings is the right to recover from anyone who injures or kills a child. The child himself recovers the damages which he has suffered, the pain, disfigurement, and personal loss. The parent recovers the present and future value of the child as a wage earner, plus the necessary medical or burial expense, less the probable

cost of rearing the child, if he dies. In cases of seduction of a female child a parent may also recover for the embarrassment and shame he has suffered. Naturally, if the child or his parent has been guilty of contributory negligence, neither one of them is entitled to recover damages. But in general adults are held to a rather high degree of care in dealing with children.

The Child's Injuries to Others

If a child is the cause of another person's financial loss may the child be held civilly in damages? In general, the answer is that a child is liable for his malicious or careless conduct which injures another. If the child has no property there can be no recovery although the one injured could probably sue now and keep his judgment alive until the child acquires property in later years. This means that if a child tortiously injures another person or his property by throwing stones, cutting out lead pipe, or driving an automobile, he may be held fully liable, civilly, if brought into court in the name of his guardian or next friend. As a rule the parent of a child is not liable in damages for the injuries done by his child. The parent may be held financially responsible if the child injures someone while acting for the parent, or he consents or approves of his child's con-

duct. Many parents rightfully feel a moral responsibility for the wrongful acts of their children and voluntarily compensate those who have been injured by their children. Many interesting cases are arising these days where innocent persons are injured by the reckless driving of motor cars by children. The children themselves are fully liable; in general, the parents are not liable, especially in cases where they are not in the car at the time of the accident. In cases where it can be shown that the child is the authorized agent of the father, or is in the service or employ of the father, the father is liable. Some cases have even gone so far as to hold that the "pleasure of the family is the business of the father." Perhaps the protection of the public demands that this be the law, although it does not seem to be the usual rule at the present time. Laws which require the personal license of every driver of a motor car based on age and general fitness seem increasingly necessary. . . . Although already many such laws have proved valueless because of ineffective enforcement machinery.

XII

MORE ABOUT THE LEGAL ATTITUDE TOWARD CHILDREN

Education

At common law it seems a parent was under no legal obligation to provide any education for his children. Apparently also he could permit them to work long hours at dangerous and unhealthful tasks with no legal interference. Elizabeth Barrett Browning's poem described a perfectly lawful situation:

"Do ye hear the children weeping, Oh! my brothers,
E'er the sorrow comes with years? . . .
For 'Oh!' say the children, 'we are weary,
And we cannot run or leap.
If we cared for any meadows, it were merely,
To drop down in them and sleep.' "

Child Labor

The last census of the United States showed that there are more than a million employed children in the country and many of them cannot run nor leap

because of industrial accidents, long hours, unhealthful working conditions. But there has been a great change of sentiment on the subject of education for children as a substitute for child labor. Accordingly the law on the subject of compulsory education and child labor has greatly changed, although the standards in many states, especially in the South, remain tragically low. The Federal government has no right to legislate on the subject under the Constitution. Probably an amendment taking away the home rule of the states would not be enforced by those states which believe in low educational standards and cheap (?) child labor. In seven states there are no educational standards whatever for the employment of children and in thirteen states, children of fourteen years of age may go to work before reaching any specified grade. Thirty-five states permit children of fourteen to work on scaffolding; thirty-three permit their employment on railroads; in almost as many, they may work around explosives. Almost a third of the states do not yet require a child under sixteen to have a certificate showing that he is physically able to work. In over half of the states there is no regulation whatever of the employment of small girls and boys on the streets, after school and at night, as street vendors or beggars.

Vocational Training

It is not to be denied that some children are mentally incapable of profiting by formal academic education; but no state should fail to provide the kind of schooling and vocational training that will best equip all its children for adult, economic independence. Children are more susceptible than adults to crippling accidents and physical deterioration due to night work, long hours, dangerous, unhealthy, or immoral surroundings. Until a majority of the people in each state has seen the dangers of illiteracy and child labor, the passing of advanced social legislation on the subject would seem a mere gesture.

Using the Rod

Nowadays, modern psychology is raising some uncertainty as to the effectiveness of the old-fashioned paddling as a method of moulding good, well-balanced character. The law however concedes every parent the right to use the rod and the strap on his own minor children whenever he feels the impulse. It should be emphasized that courts will not uphold parents who inflict cruel, malicious, or unreasonable punishment. Those who stand in the position of parents or guardians to children,—school teachers,

superintendents of institutions, boarding parents, matrons of day nurseries and so on,—also have the legal right to administer *reasonable* corporal punishment to the children under their care. Unquestionably it is well that boards of trustees quite generally forbid their employees from exercising their legal rights in this respect. Actual cruelty in any case may be punished as a criminal assault.

Legal Disabilities of Infancy

Infants, that is children under twenty-one, have not been recognized by the law as capable of voting or holding office; or of making a will disposing of their real estate; or of suing or being sued in court; unless represented by guardian or "next friend"; or in general, of making binding contracts.

Children's Contracts

Those who make bargains with children, then, do so at their peril because it is the policy of the law to protect the inexperience of children with business and money. A person who has not yet reached his majority may, at his option, decide not to be bound by his own gifts or contracts. Children are liable the same as others, for the payment of their taxes; by their military enlistments; by their marriages, if

ratified after the legal age of consent which is frequently under the age of majority. Also the bonds of children, entered into for their appearance in court or to guarantee the support of their own illegitimate children are held valid at law. There is one more apparent exception to the rule that children are not bound by their contracts. If the parent of a child fails to provide him with the necessaries of life and the child promises to pay someone who provides him with such things, the reasonable value of the necessaries may be recovered from the child, provided always that he has earnings or other property on which to levy. The seller may also in most cases recover judgment from the parent who has failed to provide for his minor child. In general luxuries and articles for mere pleasure or ornament are not necessaries. For instance cigarettes, soda water, candy for a child are not legally necessary, nor are automobiles, as a rule.

Statutes of Limitations

When a child decides to avoid his contract or ask back what he gave under a contract of purchase, by the weight of authority, he must return to the other party the money or property which he received. If the child has lost or squandered what he received he may still disaffirm his contract as a rule. For ex-

ample, if a boy were to pay $500.00 for a diamond ring for his sweetheart and lose the ring on his way home, the general rule would be that he could get back his $500.00 anyway. If he still has the ring when he changes his mind about wanting back his money he would have to return the ring. When a child decides to disaffirm his contract he may do it at once except where there has been a conveyance of real estate. If a child waits until his majority to disaffirm his contract, he must do it within a reasonable time thereafter, or within the time limit mentioned in the state statute. So called statutes of limitations usually establish rules regarding the time within which an action may be brought in court after the right to sue has arisen. These statutes not only say how long a time a child may have in which to disaffirm his contracts and sue for recovery, but also say when other people may sue on land and other contracts and for personal injuries such as slander, malicious prosecution, assaults.

Children as Witnesses

On the other hand are children regarded as having sufficient judgment and maturity to make satisfactory witnesses in courts? If above fourteen they are presumed to have the necessary understanding and intelligence to testify logically and accurately;

if they are under fourteen their competency must ordinarily be established before they testify. This means, therefore, that any child may be used as a witness if it is shown to the satisfaction of the court that he understands the "nature of an oath," and that he thinks he will be punished in the "bad place" if he lies and dies. Accordingly, children of five and six are sometimes permitted to testify in court. The religious sanction is one which baffles philosophers but a young child may be shown to be qualified as a witness if he gives glib answers to the questions: Do you know who God is, and do you know what He will do to you if you do not tell the truth, the whole truth, and nothing but the truth? Juries, of course, are always much impressed with young children on the witness stand, too!

Inconsistent Attitude Toward Children

Taken as a whole then the law on infancy has presented some strange inconsistencies. As we have already explained the common law age of consent to marry was fourteen for boys and twelve for girls but they could not make valid wills or property until they reached twenty-one; they were held liable for their damages to others but still their contracts were void or voidable. And in general they were held liable for their crimes and were amenable to the

regular criminal courts at common law!—Children as young as eight, ten, and twelve have been hanged in England and this country for their delinquent acts. A child under seven years of age was excused from all responsibility for crime on the ground that he was really too young to know better, but between the ages of seven and fourteen it was possible to show that he had sufficient development to form a criminal intent and to intend the consequences of his acts. To this there was one exception: The common law held that it was impossible for a boy under fourteen to commit the crime of rape.[1] But a girl as young as ten or twelve was regarded as able to give a valid consent to sex relations. It is impossible to avoid the conclusion that the socially and politically inferior position of women and girls had something to do with the lack of logic in the common law on these issues.

Children's Courts

Within the last thirty years there has been a very widespread change in social—and consequently in legal—attitude on the treatment of juvenile offenders. Practically every community now provides

[1] Almost half of the states still provide that if a boy under fourteen, sixteen, or in one state, seventeen years of age, has sex relations with a girl who consents or is above a specified age, he cannot be convicted.

some special machinery for hearing children's cases. In general the formal rules of evidence and technical procedure have been abandoned or much modified in juvenile courts. In these courts, for the most part socialized and informal procedure obviates the necessity of proving "beyond a reasonable doubt" a particular criminal act, and a criminal intent. Children's courts are concerned, primarily with the *causes* of a child's behavior; the part played by his physical and mental condition; the neglect or misunderstanding of his parents, teachers and others in his social background; and with the removal of the causes by social treatment.

Essentials of a Children's Court

That is to say the ideally organized juvenile court of today is a family court with broad powers in dependency as well as delinquency; the judge is specially chosen for his social training; court hearings are separate and private; decisions are based on thorough social investigation, including a study of the home and neighborhood background of the child; every child is given a complete medical and mental examination; incarceration,—or detention—when necessary is provided in a home, not a jail; sentences are indefinite and individual, and made for the purpose of protecting the child and bringing

about an adjustment in his personality and environment; there are a sufficient number of well-trained probation officers to assist the child and his family in making the adjustments necessary; there are complete social and legal records so continuity of treatment may be possible in every case; there is a recognition on the part of the court that all of its work is essentially social and that it must work in harmony and cooperation with the other social agencies in the community.

Many Children's Courts Inadequate

This is the ideal. Unfortunately it is as yet only approximated in most places. Even now, from a fourth to a half of the children's cases heard in the country come before very poorly organized courts in which one or many of the essentials are lacking. The children of the smaller cities and rural districts are usually deprived of all social-legal treatment. The courts of many of the larger cities are predominately political and technical in their social reactions and lack sympathy with and insight into the modern child welfare program. In many states, the juvenile courts do not have exclusive jurisdiction in their field but other purely legal courts have concurrently much or all the power exercised by the juvenile courts. Children accused of felony may be

bound over for trial to a regular criminal court where all the old presumptions of guilt and innocence, capacity to form a criminal intent, and so on prevail,—courts where the ordinary formal, technical procedure is followed—and where the spirit of punishment rather than treatment is the keynote. It should be added that there seems to be some disposition to carry over into the field of adult crime the spirit of understanding-treatment based on a knowledge of all the factors which is the ideal juvenile court attitude. Enormous progress has been made in the treatment of the conduct problems of children. Much remains to be done. As better children's or family courts become the rule their accomplishments will be easier to measure, and the desirability of using scientific methods in the treatment of adult behavior-problems will become easier to prove.

XIII

STEP-PARENTS AND ADOPTIVE PARENTS

The Step-parent Problem

Probably everyone knows at least one family where the children adore their stepfather, or where a stepmother has made a notable success in mothering another woman's children. Moreover, it is lamentably easy to look about and find in any circle scores of natural parents and children living always in a state of open conflict, or shamed and smoldering dislike. But the records of social agencies which deal with family problems and delinquent children would still seem to indicate that the child living in his own home with his own father and mother presents fewer difficulties in adjustment than the stepchild. It is perhaps obvious that the normal environment for the normal child is the one created by his own father and mother, and that the presence of a strange new parent, as a result of death or divorce, adds an extra hazard to childhood. It is doubtful whether the broken home—any more than the broken doll—can ever be made completely whole again, although social repairs are sometimes so skil-

fully made that only a psychiatrist or a psychoanalyst is able to detect them.

Social Case Work of Some Value

The process of repairing broken home life and developing the personalities of those brought together by chance and heredity is called case work. Case work performs few miracles but through endless patience, trained and sympathetic understanding, and knowledge of all the factors social case workers are rebuilding normal home life for many children and their parents and step-parents. Unfortunately and not infrequently the case technique fails to make adequate use of the exact contributions which the law would make to the solution of human difficulties.

The Law on the Step-parent

When a man marries a widow who has several minor children, is he required to take the stepchildren along with their mother into his home and support them all? The answer is, No. A good many widows might remain widows longer if they knew that a man does not assume any *legal* responsibility for the support of the children of the woman he marries; a good many stepchildren might feel a little

more kindly toward their stepfather who is *voluntarily* supporting them if someone would explain the law to them. On the other hand, stepfathers are not entitled to the wages and the services of their stepchildren; it might be well to have that explained, too. But when a step-parent voluntarily assumes the responsibility of caring for his stepchildren and accepts them freely into his home life, an artificial parental relationship arises which gives the stepfather the right to discipline the children and exercise other fatherly responsibilities in reference to them. In general, the reciprocal rights and duties of parent and child will continue between a step-parent and a stepchild as long as the man is willing to carry a burden which the law has not placed on him. In other words, since a stepfather is not required by law to support his wife's children he may lay aside the burden when he tires of it. Probably, if a man and a woman have had an agreement before marriage that the husband is to assume the support of the wife's children by a previous marriage the agreement will be binding on the husband. The remarried mother of minor children remains legally responsible for the support of her own children but if she has no property or earnings, the actual support will fall on the public if the stepfather refuses to care for them. In dispensing relief funds, it should be remembered that dependent chil-

dren derive legal residence and the right to charitable relief through their own father and not through their stepfather. If the natural father is still living, his legal duty to support his minor children is not affected by the remarriage of his former wife. A stepfather may as a rule adopt his stepchildren and so become legally bound to maintain them. Of course, in such a case, the mother must consent and also the natural father if living and not already legally deprived of the children's custody. By a queer legal twist, the father of an illegitimate child, however, is unable to adopt his child in some states because a person may adopt only a "child not his own"; and yet as will be seen later on, an illegitimate child was once "nobody's child" and still bears a very limited relationship to his father, in law. Obviously, a stepmother has no right to exclude her stepchildren from their father's home; nor should she complain of their presence or expense because their father remains under all his original legal obligations to them after his remarriage. Probably, also, a husband as legal "head of the house" may require his wife to render reasonable domestic services to his children by a former wife who live in the new household. A stepchild on the other hand has no right to support from his stepmother, nor has he a right to remain in her home after the death of his father. If a stepmother gives a stepchild foster-

mother care and affection, the child owes her obedience, and when necessary she has the right to discipline him.

Adoption: Another Kind of Parental Relationship

Adoption is the legal method of establishing the parental relationship between those not so related by nature. Giving fóster home care to the fatherless is a very old custom known to many ancient people but legal adoption was not known to our common law. In the United States therefore adoption was not possible until the states passed specific laws on the subject, except in Louisiana, which never accepted the common law. Massachusetts passed the first formal adoption law in this country in 1851.

Adoption by Simple Agreement

The many laws which have since been enacted differ very widely in their legal and social aspects. Usually an unmarried person may adopt or a husband and wife jointly. Sometimes adults may be adopted; other states limit adoption to minors. Sometimes the adoption proceeding is a very simple one and consists of a mere written contract, in the nature of a deed, between the parties. The agree-

ment is signed by the natural parents and the adopting parents and placed on record and the adoption is complete. An oral agreement is not sufficient to create a legal adoption; nor is a child adopted even though he honestly believes he has been adopted because a foster parent has told him he is adopted and has treated him as his own child. Whatever the statutory formalities are, they must be carefully complied with in adoption cases.

By Judicial Action

The better practice, followed in many states, is to treat adoption as a judicial proceeding. Under such laws, a petition must be filed in court asking for the adoption of a certain child; also the consent of the child's parents—if living and not barred already from parental rights—must be filed; the consent of the child too, especially if over fourteen years of age, is usually required. In its discretion a court may always require an investigation before the final judgment or adoption decree is placed on the record.

Social Action Becoming Necessary

The most approved social practice would make a preliminary social investigation *mandatory* but as yet few state laws seem to require it. Probably

under all the laws which make adoption a court affair the court may at its discretion refuse to permit an adoption to take place. The court should always consider the welfare of the child and if it seems for the best interests of the child the adoption should be refused. That is to say, adoptions should be regarded as social as well as legal proceedings and a careful investigation should always be made of the home and character of the petitioners, or adopting parents, and the health, mentality, and social background of the child, so that every child may be placed in the type of home best fitted to his particular makeup and needs. To assure a happy adjustment between the adopting parents and the child a probationary visit-period of six months to a year should be required in every case before the final adoption decree is entered. While this is socially desirable and legally possible, it is rarely required, by the law.

Is the Order of Adoption Final?

The preliminary work should be done most carefully because after the final order has been entered the relationship of parent and child with all its mutual duties and liabilities has been fully established between the child and the adoptive parents. In general the adoption order is final and cannot be

set aside unless there has been actual fraud or the natural parents have not been given proper notice. In every case courts will proceed very slowly in disturbing a child after adoption unless it is clearly for his best interests to be disturbed. The welfare of the child is the primary consideration and for his good, adoptive parents may be deprived of guardianship the same as natural parents if they prove themselves unfit. If an adequate social investigation precedes the adoption order, it is rare indeed that a mistake is made. The Ohio law contains a provision that an adoption decree may be set aside before a child reaches the age of fourteen if he develops feeblemindedness, epilepsy or venereal disease as a result of conditions existing prior to the adoption and of which the adoptive parents had no knowledge. . . . Such a provision makes it safer to adopt children than to have them, particularly where there has been a social investigation and six months trial visit.

The Effect of Adoption

The general effect of adoption is to deprive the natural parents of all rights and responsibilities to their child and to confer all those rights and responsibilities on the adoptive parents. At the same time the adopted child no longer owes his natural

parents obedience and service but owes them to his adoptive parents. The adopted child has the right to the name of his adoptive parents; he now acquires his legal settlement through them; and his earnings are theirs the same as though he were their natural child. The adoptive parents on their side owe their adopted child support and protection. They are entitled to his custody and they may whip him or discipline him reasonably. Usually an adopted child has the same right to inherit the property of his adoptive parents as a natural child, but often retains his right of inheritance from his natural parents as well. The inheritance rights of all adopted children or their parents is of course governed by the varying statutes of the forty-eight states. Usually there is no right of inheritance in the child from the relatives of his adoptive parents. There is some legal conflict on the rights of natural parents and adoptive parents in property left by an unmarried adopted child. In all cases perhaps the safest rule is to urge everyone to make a will, then the law through its general rules of inheritance will not have to step in and make an arbitrary disposition of the property of any deceased person.

XIV

THE ILLEGITIMATE CHILD AND HIS PARENTS

The Bastard: Nobody's Child

The legal status of the illegitimate child is an excellent example of how law reflects social attitudes. Even among savage people some sort of formality or ceremony usually precedes social sanction of marital relationships and the bearing of children. Christian people adopted a highly punitive and censorious attitude toward irregular sex relationships, at least so far as the illegitimate mother and child were concerned. Social and religious censure have doubtless killed as many babies as legalized infanticide among primitive people. The illegitimate child has been designated in our law as bastard and "nobody's child," the punishment for the sin of the father and the mother being thus meted out to the child. The illegitimate child at common law was at best a half orphan, for the law did not recognize that he ever had a father; for the most part his legal relationship to his mother was so limited that he was literally "nobody's child." Perhaps, we may congratulate ourselves on increased religious tolerance,

higher educational standards, and broader human sympathy, but protections for "nobody's child" have come slowly indeed. Only within the last ten years has a genuine interest in the illegitimate child begun to take tangible legal form.

Who is Illegitimate?

At common law a child was legitimate if born or begotten during the legal marriage of its father and mother. This is still the English rule but most of the American states have provided by special statute that if the parents marry after the birth of a child he is legitimate; also that a child born during a void or annulled marriage is legitimate. For example, a child born during a bigamous marriage, which of course is not a legal marriage, is rather generally regarded in the United States as legitimate, but in some states legitimate only as to the innocent party to the marriage.

Illegitimate Children of Married Women

While an illegitimate child is usually the offspring of an unmarried mother, it is of course possible for a married woman to have an illegitimate child. The English common law made this almost an impossibility, because in the old days, if a mar-

ried woman had a child when the husband was living "any place within the *four* seas" the child was legitimate even though the husband and wife had been completely and continuously separated by the four seas for years. The social and legal consequences of bastardy or illegitimacy were so horrible that the law thus apparently tried to avoid the issue by resorting to absurdities. There is still a very strong presumption that the child of a married woman is the legitimate child of her husband; but if the proof is clear that he could not have been the father, the child may be established as illegitimate. The fact of illegitimacy cannot be proven by the testimony of the man and woman themselves, although it would seem they should know more about the matter than anyone else in the world. When a man marries a woman knowing her to be pregnant the law presumes that he is the father of the child and it is therefore legitimate. It has already been shown that the marriage may be null if the man did not know of the pregnancy and had not had relations with the woman, himself.

Legal Effects of Illegitimacy

The effects of illegitimacy in common law were substantially these. The child had no legal name until he gained one by reputation; he had no right

whatever to support from his father and apparently, at first not even from his mother; the child could not inherit property from his father, nor from his mother nor from any of his relatives; he could not transfer any property by inheritance to his father nor to his mother nor to any of his relatives. The illegitimate child was nobody's child and so really had no kin from whom he could inherit or who could inherit from him except "heirs of his own body," that is, his own blood children. So unless there was an actual devise under a will there would be a technical default of heirs and the property of a person of illegitimate birth or the property of one related to a person of illegitimate birth would be forfeited to the crown. Unless specifically changed this is still the law. There have been many changes in this country in the different states, of course, but the law still needlessly discriminates against the child born out of wedlock.

What's in a Name?

It was a harsh and uncivilized people whose social philosophy led them to evolve our legal attitude toward illegitimacy. But perhaps it is not so brutal as it seems if other common law concepts are kept in mind. . . . The right to use a certain name is probably governed for all of us more by custom and

reputation than by law. There seems no weighty reason therefore even today why we should deliberately confer the name of the father on the illegitimate child who conceivably would be more embarrassed by using the name of a man with whom he does not live, than by using the name of the mother with whom he does live. The Castberg law, which became effective in Norway about twelve years ago says on this subject: The illegitimate child "shall be entitled to the father's as well as the mother's family name. If the father's name is not assumed at the time of birth, a later assumption of the father's name shall be permissible only under the rules of law governing change of name."

The Norwegian Illegitimacy Law

This fairly recent Norwegian law is a radical pronouncement on the subject of illegitimacy and is regarded by some as the ideal to be worked toward in this country. Certainly there are many excellent features in the Castberg law but is it not unreasonable to suppose that a Norwegian law could be satisfactorily imposed on a people whose social and legal attitudes on illegitimacy have been so different historically? A widespread program of social education on the subject of illegitimacy should precede attempts at fundamental legal changes. The

Norwegian law makes full legal provision for the care of the illegitimate mother prior to and during confinement, for nursing care afterward, for the support of the child until the age of sixteen and in some cases longer. The standard of maintenance is that of the richer of the two parents and of course the mother must contribute according to her means. The law also places a joint responsibility of support on several men who *might have been* the father of an illegitimate child, when it is impossible to prove that only one of them could have been the father. In our American eyes this is without doubt the most radical provision of the Norwegian law, for in this country the classic way for an alleged father to escape the responsibility of supporting an illegitimate child is for him to introduce evidence in court tending to show that *other men* were involved with the woman at about the same time that he was. Remembering that there is some doubt whether a father was formerly under more than a moral obligation to support his legitimate children, would it be logical to attempt to increase parental duty to illegitimate children by far reaching legislation without first changing public sentiment on the subject very definitely, in this country?

The Basis of Bastardy Statutes

Laws for the support of illegitimate children seem to have had their beginning with English speaking people in the eighteenth year of the reign of England's virgin queen. At that time it was admitted that illegitimate babies were being born in spite of the law and the church. Before then the fathers did not have to support them at all; and in an effort to avoid the blame and shame, the mothers often abandoned them, even as today. It was discovered that the public support of these children was becoming a very great burden on the various English parishes, therefore, "for the better relief of every such parish" and "for the punishment of the mother and reputed father of every such bastard child," it was enacted that the mother *or* the father should make payments for the relief of the child. In the early part of the nineteenth century the responsibility of the father to the child was somewhat increased in England and this is the legislation which has been the model for most of the American legislation on the subject.

The Illegitimate Mother the Legal Guardian

In all the states the mother of an illegitimate child is entitled to its legal custody but of course by improper conduct may forfeit her right, the same as

a legitimate parent. Unquestionably an illegitimate child needs the love and care of its mother as much as a legitimate child, or perhaps more because of other handicaps. If an illegitimate mother would make a proper guardian for her child she should therefore be encouraged to keep her baby with her. In some cases the custody of the baby may prove an effective deterrent to other sex irregularities. An illegitimate child gains his legal settlement through his mother and not through his father. This is a very important rule to remember as so many illegitimate children become public charges, and of course the right to relief is contingent on legal settlement. The responsibility to support accompanies custody. In all but five of the states the mother may attempt to secure assistance from the father under the so-called "bastardy laws" for the support of the child. In this connection it is strange to note that the proud old state of Virginia has no legislation for the support of illegitimate children but as early as 1785 recognized that it had an illegitimacy problem by enacting that the issue of null marriages should be regarded as legitimate and created the right of inheritance between illegitimate children and their mothers. The amount allowed the mother in bastardy proceedings is usually woefully inadequate. This happens because the amount set by the statute is too low, or because judges and jurors seem to have

unreasonable sympathy for the alleged father. It looks as though it may be some time yet before the legal phrase "the welfare of the child is the paramount consideration" becomes the legal rule in bastardy cases. In perhaps one-fourth of the states the father of an illegitimate child may be held under criminal statutes in substantially the same way as for a legitimate child for deserting or non-supporting an illegitimate child after paternity has been legally established.

Inheritance Rights of Illegitimates

The most conspicuous legal disadvantage of illegitimacy has been the loss of the right to inherit property. In the United States the illegitimate child now has substantially the same standing in reference to its mother as a legitimate child, although the illegitimate child's standing in reference to the mother's kindred is still somewhat limited. That is to say, it has been held by the courts of some states that statutes removing the disabilities of inheritance, between an illegitimate child and its mother, do not mean that the child may inherit from the kindred of the mother. In a few states the contrary rule has been established. In about half of the states there is no possibility of an illegitimate child inheriting from its father. In a few states the right

of inheritance follows if paternity has actually been established or the child has been acknowledged by the father. The right to inherit is one which must be conferred by a specific statute and legislatures may give illegitimate children such rights as they believe fair. In North Dakota in 1917 a law was passed making *every child* the legitimate child of its parents with the right to inherit from both parents and their kindred, if paternity is established within one year of birth. In 1921, Arizona declared every child to be the legitimate child of its natural parents and made such child an heir of its parents. Statutes now often provide that an estate left by an adult illegitimate child who is married and dies intestate, without children, shall descend to the surviving husband or wife of the illegitimate. Where such a rule does not prevail it would be advisable for everyone contemplating marriage to discover whether his fiancée was born legitimate or illegitimate. Of course a carefully drawn will is always the best protection for those who wish to have their property disposed of after death, according to the dictates of their own conscience. As a matter of fact, it would be well for those who urge that illegitimate children be given the same right of inheritance as legitimate children in reference to their father to keep this in mind: A father of legitimate children may by will disinherit his legitimate chil-

dren and may by will make adequate provision for his illegitimate children, if he desires to do so. On the other hand, it is exceedingly easy to think of cases where it would be anything but equitable to permit an illegitimate child to step in and share on the same terms with a lawful wife and legitimate children who may have assisted in the accumulation of the unwilled property through long years of devoted service. An illegitimate child should not be socially stigmatized because of the accident of its birth, and it should be entitled to care and support from both of its parents but it is doubtful whether it would be expedient to carry the protection of the illegitimate child so far that legitimate children would be penalized.

The State the Ultimate Guardian of All

There should be a recognition that the State should have a definite responsibility to secure adequate care and guardianship for every child, legitimate and illegitimate; and adjustments should be made on the basis of the exact facts in each case. Any attempt to solve the problem of illegitimacy by wholesale treatment, is doomed to failure because every case is different and demands different social case treatment. In 1917 the state of Minnesota passed a law in which it is declared the duty of the

State to secure for illegitimate children the nearest possible approximation to the care, support and education they would have received if born of lawful marriage. The State Board of Control has broad powers in giving effect to the law and has passed a number of rules which should amply safeguard the rights of illegitimate children if the highest standard of social case work is maintained in that state. For instance, the State Board "does not regard any man as wronged who has had relations with a girl at a time when he could be the father of a child born, if he is made to bear the parental responsibility, even though other men have had relations with the girl at or about the same time." Also "because of the very large death rate of children born out of wedlock, the State Board of Control has ruled that such children must be nursed by their mothers for a period of at least three months, and as long thereafter as possible." In making settlements, it is ruled that, "an infant cannot be maintained properly on much less than $20 a month and the cost increases as the infant grows older. A minimum lump-sum settlement should be in the neighborhood of $3,000." As a matter of practice Minnesota courts do not order payments as high as this. Support orders, however, are said to run considerably higher there than in Ohio, for instance, where there is no legal limitation on the amount which may be allowed. On the

whole, the Minnesota law is working satisfactorily, —in Minnesota!

And so, at last, nobody's child is slowly gaining a status which should ultimately entitle him to every necessary legal and social safeguard.

XV

THE CRIMINAL RESPONSIBILITY OF THE MENTALLY ABNORMAL

The army mental tests and "shell shock" have dramatized feeblemindedness and insanity for the masses. Today almost everyone knows there is a difference between feeblemindedness and insanity and that insanity is a generic term covering many manifestations of a diseased mental state. Of course, a queer crowd of popular biologists and psychologists have taken advantage of the interest in mental abnormalities to mis-state and over-state conditions with the result that some people have been stampeded into a belief that we are becoming a nation of morons and nuts fit only for extensive schemes of sterilization and segregation. Crude though many of the popular conceptions of mental defect and disease may be, they are an advance over the indifference, ignorance, and superstition of past years which connected lunacy with the moon and classified the mentally abnormal as evil spirits, witches or saints. Scientists will continue to advance slowly as before but the time is doubtless approaching when there will be scientific certainty

on the extent, cause, treatment, and control of the various abnormal mental states. Until then: "Scramble along, thou insane scramble of a world, thou art all right and shall scramble even so."

If Justice Miscarries, Who is to Blame?

The recent mental hygiene movement has emphasized the value of early diagnosis, correction of physical defects, personality studies, and social adjustments in school, industry and the home in dealing with the problems of personality and conduct. All this is sound: there cannot be too many well organized psychiatric clinics nor well-trained psychiatric social workers. A word of warning needs only to be directed to those who would crystallize our present incomplete understanding of mental states into fundamental changes in our judicial system. Certainly some changes could be made even now but of those who most bitterly denounce the "anti-social attitude of courts and judges" in dealing with the feebleminded and insane, how many really know what they are talking about? Not many, not many. . . . There is little excuse for the situation, too, because the law on the subject is not particularly vague or complicated, nor on the whole, illogical. If justice seems defeated sometimes in the cases of feebleminded and insane it is much more a

criticism of our ancient jury system and the basic weakness of our contest-plan of court trials than it is of overwhelming fault in the abstract law on persons of unsound mind.

Legal Insanity and Medical Insanity

In law, the term insanity is ordinarily used to describe any unsoundness of mind, whether it be in the nature of an inherited or congenital defect, such as idiocy, imbecility, or feeblemindedness, or of any of the so-called acquired mental diseases such as paranoia, dementia præcox, paresis; and many of the rules concerning insanity cover drunkenness, especially delirium tremens, as well. Actually the legal phrase "non compos mentis," meaning of not competent or of not sound mind, describes better than insane and feebleminded, those for whom the law has established special legal rules. It is silly, but perhaps one of the reasons why there has recently been so much opposition to the legal attitude on mental diseases and defects seems to lie in the fact that the law has continued to use its old generic terms and has not adopted all the technical jargon of modern psychiatry, psychology and social work. If substantial justice is done, what difference after all does that make? Why should the law concern itself with the fifty or more abnormal states which

have been more or less definitely isolated unless they affect the thinking and the acting of an individual in such a way that he becomes dangerous to society? Among the physicians themselves, it is well known, there is as yet little real agreement as to definitions and causes of all the abnormal mental states. It is true that the psychiatrists say there may be disorders of perception, feeling, emotion, memory, attention, personality; of the train and content of thought; and of action; that there may be combinations of these and border line conditions as well, all of which may be appropriately classified as "medical insanity." On the other hand, the law is not primarily concerned with the present state of scientific opinion and the endless medical definitions and differentiations of mental states except only in so far as they affect, criminally, the ability of a person to distinguish between right and wrong, and civilly, his ability to manage his affairs with ordinary prudence. There has been a tendency in recent years for some American courts to modify slightly the old [1] legal tests of mental competency, and an increasing willingness of juries to accept peculiarities of personality, uncontrollable impulse, and "medical insanity" generally, as justification for a crime. It would

[1] Modern American law on insanity is based largely on the rules laid down in the famous English case of McNaghten, decided in 1843.

be better to say there has been some change in the *spirit* of the law on insanity, although not much change in its *letter*. Whether such modifications as have apparently begun to creep in are in line with sound social progress and should be made a part of our basic law is certainly still an open question. Already it is beginning to be clear that there can be no ultimate justice in any law which cannot be administered as fairly for the poor and friendless as for the rich; as well for the ignorant Negro as for Thaw, Leopold and Loeb, and Remus. All in all, may it not be possible that the old right and wrong test of mental capacity is a better protection for the welfare of society than the opinions of conflicting medical authorities on hypothetical situations involving little understood emotional and mental states? Mistakes in the legal field of insanity may have such far reaching personal and social consequences that there is real need for the ordinary laymen,—who vote for public officials, who serve on juries, who act as social advisers to others, who mould legal opinion in short,—to know the story of law on the insane and feebleminded, uncolored by social or medical propaganda.

Law May Always Be Changed

It is well settled that the State as ultimate parent or guardian of all may establish such rules and laws as may be necessary for the protection of those suffering from defects or disease of the intelligence. If our present laws on the subject are unjust or inadequate, all necessary changes may be made. Sudden modifications in well-established legal *principles* are rarely to be recommended. Possibly all that is really needed here is a more active social consciousness expressing itself in improved *administration* of the law.

Everyone Presumed Sane

What is the present legal attitude on the subject of the insane? Perhaps fundamental to an understanding of the subject is this legal rule: Everyone is presumed in law to be sane; anyone claiming the contrary must prove his contention "clearly and by reliable evidence" or "beyond a reasonable doubt," —so run the legal phrases; this he must do whether he sets up his own or another's insanity. The abstract rule on the subject is plain and sound; interpretations in specific cases are unavoidably difficult; men differ and will continue to differ on what evidence is "clear" or "reliable."

Insanity Not Always Chronic

There may be a little variation in the mental alertness of a feebleminded person, depending on his physical condition and environmental circumstances; it has always been vaguely recognized that many forms of mental disease are definitely characterized by "lucid intervals" or intermittent periods of partial or complete restoration to mental health when the afflicted one becomes capable of understanding what he is doing. Therefore, the law requires that when evidence of insanity is offered it must be contemporaneous with the act in question or a reasonable time before or after the act. In other words, if insanity is a defense to crime, it must be shown to exist at the exact moment when the act complained of is committed. Insanity before or after an act is not a defense if at the time of the crime the accused is mentally able to form a criminal intent, that is, if he is able deliberately, maliciously, wilfully, to understand, plan, and intend the consequences of his act. Perhaps it should be pointed out in passing that a mere lack of consciousness of wrong in a sane person is of course not a defense to crime, as ignorance of law is never a legal excuse.

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Is Insanity Always Inheritable?

After the probable insanity of a person has been established, the insanity of other members of his family may be shown to throw further suspicion on the sanity of the one before the court. It is easy to see how this right may be abused and rendered absurd in operation. There is no universal test for dividing the sane from the insane; probably there has never been a family which has not had some members with "queer," "nervous," "different" personalities; persons who could now be made to appear clearly insane if the present insanity of a relative is admitted. Again, if John Jones is insane—but if the truth be told—as a result of a syphilitic infection and is suffering from paresis, where is the sense of dragging into the evidence his aunt Mary, whose abnormal state was due—if the truth were known—to an atrophied thyroid?

Tests for Jurors

Is it not too much to expect the average, ignorant jury to understand the complicated issues of fact which are presented in cases of mental abnormality? Intelligence tests alone may not measure intelligence with perfect accuracy, but surely it is possible to devise better methods of determining the qualifica-

tions of jurymen who serve in insanity cases than is used at the present time. It may honestly be said that almost the primary question about a prospective juryman nowadays seems to be: Is he willing to serve? Some kind of a modified Binet test given to persons called for jury service might at least exclude all low grade morons from serving on a jury of peers!

Only Sane Persons Able to Defend Themselves

If it is shown that a person is insane at the time he appears for his trial he cannot be tried for a crime, even though he may have been entirely sane at the time of its commission. However, if he later recovers his sanity he may then be tried for the crime, and if it is then shown that his insanity developed after the crime he may be found guilty. But here again it is difficult for juries to comprehend that insanity is a generic term covering many different mental states, some of which are transitory and periodic, some of which do not affect the intelligence and ability to reason except perhaps in a limited way, and some of which do not affect in any way the capacity to distinguish between right and wrong.

Variations of the Right and Wrong Test

An insane delusion on a subject unconnected with the criminal act is not and should not be a legal defense unless society is willing to say that the right of one individual to be governed by his lawless impulses is more important than the security of the social group,—and sometimes that seems to be our modern attitude. An insane delusion which is itself the direct cause of a criminal act may be a legal defense. For instance, if a man is insane on the subject of religion and believes that he is the reincarnation of Moses and in direct personal communication with God but is otherwise sane, he should not be acquitted if he kills his sweetheart in a sudden fit of temper which is in no way connected with his religious delusion. On the other hand, if a woman suffers from a delusion that her husband is plotting to poison her and she insanely believes that the only way to save her own life is to take his, her insanity would be a legal defense. That is to say: although the woman really knows the difference between right and wrong, if she is unable to restrain herself from doing the wrong because of her unreasonable belief her defense of insanity is legally acceptable. All this is plain enough, but almost anything may happen in a judicial system in which it is the duty of the judge to charge the jury on questions of law and

the duty of the jury—composed of laborers, steamfitters, auto mechanics, grocers, idlers, whatnot—to interpret the facts as they come out in the evidence. All the authorities agree that mere mental weakness, ignorance, excitability, moral or emotional insanity are not legal defenses to crime but it must be admitted that some of the distinctions drawn between "insane delusions," "irresistible impulse," and "emotional insanity" are so fine and close that they are almost meaningless. In a few states "irresistible impulse" is a recognized legal defense if the accused is able to show that he was irresistibly impelled into crime because his power to choose to do right has been utterly lost because of mental disease. This would seem to mean that the law sometimes says that irrespective of the ability to know right from wrong, if the accused is unable to control his impulse to do wrong he may be excused from the consequences of his criminal act. With such a legal attitude little fault could be found if the person, though freed from present criminal responsibility, could be permanently institutionalized or permanently cured so that society might be forever safe from his future criminal impulses. Obviously no sane person can be kept in a hospital or a department for the criminally insane. Consequently, a person who has committed a crime and has been acquitted on the ground of insanity at the time of the crime is

sometimes able to gain his release from an institution or asylum by showing that he is recovered and is *now* sane. Although the Thaw case and the recent Remus case in Cincinnati are notorious examples of how criminals, especially *rich* criminals, are able to take advantage of the law to the danger of the State they do not prove that the law on insanity is essentially unfair. They do perhaps suggest that the question of mental health and individual adjustment is of very great importance to society, that routine psychiatric examinations are at least as necessary as smallpox inoculations, that the determination of sanity and insanity should be a public function, and that every community needs mental hygiene clinics as preventives of crime.

Drunkenness as a Defense to Crime

Drunkenness is a temporary condition caused by drinking intoxicating liquor so that the consciousness of a person becomes clouded or lost and his mental and emotional state rendered abnormal; delirium tremens is a more settled and lasting condition of mental disease due to the use of liquor. Delirium tremens, therefore, is governed by substantially the same rules as insanity in law. Voluntary drunkenness, on the other hand, is not an excuse in law for crimes committed when drunk. There are two ex-

ceptions to this general rule. If one is made drunk through the carelessness or fraud of another and commits a crime when in that state, he is not held legally responsible. Again, some crimes such as first degree murder, for instance, usually must be shown to have been committed with deliberate premeditation and malice. If a person while voluntarily so drunk that he does not know what he is doing kills another, he probably would be held for second degree murder or manslaughter only; unless the intent to kill was in fact formed before the drunkenness occurs. It is possible, though not probable, that the 18th Amendment to the Federal Constitution will tend to increase the law's severity on persons who commit crimes when intoxicated.

XVI

OTHER LEGAL QUESTIONS AFFECTING THE INSANE AND FEEBLEMINDED

Less spectacular but doubtless of greater actual volume are the legal controversies concerning insane and feebleminded people in their private or civil capacities. Under this head three main subdivisions may be profitably considered: When may a person non compos mentis be placed under guardianship? Second: What are the general rules on commitment to institutions? Third: To what extent does mental abnormality interfere with the validity of contracts, wills, etc.? It will be possible to give here only the briefest and most general answers to these queries; detailed answers would easily run into volumes.

Guardians, or Committees for Mentally Unsound

The law has usually not attempted to set up distinctions governing insane, idiots, imbeciles, and morons. The wisdom of this is patent when the remarkable wording of some of the existing statutes is noted. For instance, "Imbecile as used in this chapter means a person who not born idiotic has become

so." [1] Again we may read the solemn verdict of the Ohio legislature that the guardianship of persons of unsound mind may be terminated when the probate judge is satisfied that an idiot, imbecile, lunatic, or incompetent because of advanced age is "restored to reason." [2] Physicians and social workers with their superior psychiatric knowledge are often inclined to laugh at law which expresses itself thus crudely but for their benefit it should be reiterated that law is properly concerned only with the *effect* of a mental condition and not with its *cause* or its name. The various state laws recognize that the need for a guardian arises whenever a person is unable to manage his business affairs with ordinary prudence and foresight due to lunacy, feeblemindedness, youth or age, and not infrequently the benefits of guardianship are extended to habitual drunkards and "spendthrifts" as well. As a rule a guardian or a "committee" for a mentally incompetent person is not appointed unless he owns property; substantially the same rules apply to the guardians of insane persons as to children. A guardian is an officer of the court; he usually must give bond conditioned on an honest and discreet administration of his ward's affairs; he is entitled to a reasonable compensation for his services; he must file such reports as the court

[1] Ohio Statutes, Sec. 10988.
[2] Ohio Statutes, Sec. 11010.

requires from time to time; he may be discharged for unfitness or whenever the condition of his ward makes his services no longer necessary. The commitment of a person to a state hospital or asylum for the insane does not automatically take away his right to manage his property and a guardian should be applied for in a separate action. A moment's consideration should suggest the logic of a further legal rule: A person may be suffering from a disease or defect which renders him incompetent to manage his business and property with ordinary care and yet he may at the same time have sufficient mental capacity to know right from wrong and be able to form a criminal intent.

Commitment to Institutions

A person of unsound mind whether insane or feebleminded may generally be committed to an institution when it is proven that he is in a condition making it unsafe for society to permit him to remain at large. It should be noted that it is not the fact of mental disease or defect alone which legally justify commitment but the danger to society. There are uncounted thousands of feebleminded persons who are mild, well-mannered citizens doing valuable work in the world who are less dangerous to the welfare of society than other persons of nor-

mal or superior intelligence and unstable emotions. . . . Not by a good deal are all the insane in need of physical restraint.

Emotional Stability More Important Than Intelligence?

Theoretically, perhaps, it may seem that the incarceration of any person should be governed by this test: Is it dangerous to permit him to be at large? But persons who are not classifiable as definitely mentally deficient or diseased cannot be incarcerated under present laws, however strong the probability may be that they are potentially dangerous to the State, until they have actually committed a crime and have been found guilty in the regular way. Any other legal attitude would be inconsistent with personal freedom and a democratic form of government. Who, indeed, is not at least *potentially* a criminal? Who is able, with present techniques, to prophesy with exactness the course of a human personality? The institutional care of the insane, and especially the feebleminded, is entirely inadequate throughout the country. Perhaps progress would be made more rapidly in securing better facilities if more emphasis were placed on the need for special vocational and habit training for those of non-competent mind and less on the abstract danger of per-

mitting them to be at large. Furthermore if greater emphasis were placed on the possibility of the *voluntary* admission of persons of abnormal and subnormal mind to training schools and working colonies it might be less difficult to prevail on legislatures to build institutions. Buildings may be less necessary to the adjustment of people than expert case study and service. . . .

Insane Accused of Insanity

The proceedings to determine the necessity for a commitment of a mentally incompetent person are said to be civil or quasi-criminal. As a matter of practice persons who are suspected of being dangerous on account of their mental state are really accused of insanity or feeblemindedness, and are tried and found guilty or not guilty. The person so accused is entitled to formal notice that a case against him has been filed in court. Ordinarily if he is in a condition to be present he may appear in court personally. He has the right to defend himself through the testimony of witnesses in substantially the same way as though he were accused of crime. He may be represented by as many attorneys as he can afford. If no detention hospital is provided—and it is very rare that a community does provide a separate place for the care of those ac-

cused of mental defect or disease—the defendant may be kept prisoner in the jail pending the final decision. The actual finding of insanity or feeble-mindedness is sometimes left to a jury of laymen. In some states the better practice is followed of having a commission of several well-qualified persons examine the patient and the evidence; some states merely require a certificate of one or two practicing physicians to attest the mental abnormality. Sometimes the judge alone makes the final decision as to sanity or mental incompetence based upon such evidence as may seem pertinent to him. After the accused is found to be insane or feebleminded the question of his actual incarceration in a public or private hospital is usually in the discretion of the judge who may permit him to remain under the supervision of his relatives or friends as seems wise. An emergency commitment good for a few days only is valid without a formal court hearing but should be followed within a short time by a formal adjudication. Some jurisdictions permit so-called voluntary commitments where the patient realizing his own need for hospitalization may ask for care in an institution for a limited time.

Release from Institutions

Once the patient is in an institution the superintendent may usually discharge him on a trial visit or permanently, whenever he is regarded as no longer dangerous. The patient always has the right to a writ of habeas corpus whereby he may have a new hearing in court to re-determine the necessity for his continued detention. There is no limit to the number of times a patient may have a hearing on the writ to inquire again into the state of his mental health. Although this is the law it may easily be seen that a patient who is without friends and money is at a disadvantage in carrying on such litigation which is expensive as all court proceedings are. People sometimes have an exaggerated fear of the danger of unjust commitments and detentions. This is inevitable because insane people do not always admit their insanity and persecutory delusions are frequently the most noticeable manifestation of a mental disorder. However, the probability that a normal person may be found dangerous by a court and persistently held a prisoner in an institution by a corrupt superintendent is rather remote. It is hard to conceive of a conspiracy between relatives, physicians, a court and an institution, especially concerning a *poor* person. . . . And the others are only too amply able to secure attorney service and court

hearings. . . . Hospital superintendents and judges are on the whole far more liberal in ordering discharges than the public welfare demands.

The Contracts of the Mentally Incompetent

Mental incapacity due to insanity, idiocy, senility, drunkenness may invalidate a contract if the person making it does not at the time understand the nature and effect of what he is doing. That is to say an agreement to buy or sell something, to enter a partnership, to become a husband or wife is not valid if there is no rational, understanding assent by one of the parties. Mere weakness of mind or insane delusions not connected with the subject of the contract do not affect its validity. If a person afterward recover his reason he may, if he wishes, ratify acts performed during his mental incompetency. Contracts for actual necessaries of life for a mentally incompetent or his family are binding on him. This is true even though he be under guardianship at the time. As a rule all other contracts made by a person under guardianship are void. Although there is some conflict on this point, the contracts of a person of unsound mind are usually binding if they are made with someone who is ignorant of the fact that he is dealing with one who is unable to understand the nature of the transaction. To be held valid,

however, such a contract must be fair and its terms so far carried out that it is impossible to restore the parties to their original condition.

Who is Able to Make a Valid Will?

Many cases are constantly arising where it is contended that a will should not be given effect because of the mental unsoundness of the testator, or maker of the will. Extreme age, peculiarity, ignorance, unfairness, are not in themselves enough to set aside a will—nor are insane delusions not connected in any way with the disposition of the property. Every will to be held valid must be made by one with "sound mind and memory," but this merely means in law that the person must comprehend the extent of his property and the usual claims of those naturally dependent on him. It has sometimes been held that persons even under guardianship, are able to make valid wills because they are shown to have legal understanding of their property. On the other hand it frequently happens that a court and jury are persuaded that a person who has never been legally declared of unsound mind really did not comprehend his property and the natural ties of affection and kinship, at the time he drew his last will.

Torts

A person non compos mentis is liable in damages for the suffering or injury he causes another by his wrongful act. That is, if an insane or feebleminded person carelessly drives an automobile and kills or injures someone, or if he commits an assault and battery, or a trespass, he may be sued and his mental condition is not a defense. Recovery in such cases, however, is limited to the actual damages done. The mental unsoundness of an insane or feebleminded person properly protects him against punitive damages, or damages in excess of actual damages allowed injured persons in some cases. If the tortious act of a mentally incompetent is the kind which presupposes malice and mental intention, such as slander or libel, there can be no recovery.

Who are Credible Witnesses?

An insane or feebleminded person may be permitted to be a witness in court if it is determined that he understands the nature of an oath and is able to give a clear and correct account of a matter. It may appear to some that it must be a dangerous proceeding to permit an insane person to leave an asylum and come into court and testify. It would be a strange jury indeed that would not think so too

and would not discount somewhat the testimony of an insane person. But all the insane persons in the country have not been definitely diagnosed and incarcerated by a good deal. Perverse and biased witnesses, not recognized as mentally sick or deficient, are testifying in court hearings daily. The credibility of any witness therefore is always a matter to be subjected to every possible test for reasonableness, fairness, and accuracy. . . . Exactly how any witness will impress a jury will unavoidably depend on the whims and the prejudices of the jury as well as the expertness of the cross examination.

Who is Fit to Vote?

Many states deprive idiots and lunatics of the right to vote. This does not mean that eccentricity, weakness of mind, extreme old age are bars to suffrage. The real test is not how much does the voter know about efficiency in government, platforms or candidates, but does he understand the nature of the act he is performing?

. . . The present tests for mental deficiency and disease are not yet completely standardized or adequate. Medical and social therapy is making progress but must wait on further scientific research for the perfection of methods. Some of the legal phrases and principles in the law on the feeble-

minded and the insane are archaic and its administration needlessly technical, harsh and unsocial. On the whole, though, it is difficult to justify the present outcry against this law and the demand for its radical revision. It will be time enough to reorganize and codify this law when, if ever, psychology, psychiatry, psychoanalysis and social work reach some common conclusions and are able to defend those conclusions against their critics.

XVII

WHAT PRICE PUBLIC HEALTH?

The truth may as well be admitted: We may talk at length about the importance of knowing about courts and crime, about marriage and divorce laws, children's legal rights and workers' wrongs, immigration problems and the feebleminded, but what if there is no health in the land? Whether it be in the field of behavior or health some people still choose to believe they are masters of their fate or victims of their own free will or God's malevolence. Fortunately there are not enough of the folk who refuse to admit that effects follow causes and that causes may nearly always be located and changed or removed, to block entirely the progress of public health legislation in the United States.

Is Public Health an Accident?

So it happens that the span of man's life has been more than doubled, certain diseases such as typhoid fever, malaria, and smallpox almost eliminated, and many others so checked that it is not difficult to show that a community may have within natural limita-

tions, as low an illness and death rate as it is willing to tax itself for. In other words, infant mortality rates vary from country to country and from city to city. Tuberculosis rates vary. Smallpox rates vary. Life expectancy and adult death rates vary from time to time and place to place. The best rates are always to be expected in those communities which have recognized their public health duties longest and have established the most comprehensive programs for the promotion of health, the prevention of sickness, the control of infectious and contagious diseases, and the elimination of unnecessary industrial accidents and disease. In all this the important place of private physicians, private clinics, nursing organizations, housing associations, agencies for social hygiene, community recreation associations, and general private educational and propaganda organizations for health cannot be overlooked. But, fundamentally, health is a social problem that demands for its successful treatment public support and public law.

Some Legal Measures for Health

A random glance at some of the subjects which have been legally recognized as having a definite bearing on the health and death rates of a community suggests the almost limitless possibilities of

legislation for health: Full time, adequately trained public health officers functioning through state boards of health, city, county or divisional boards; legally licensed physicians, nurses, dentists, pharmacists and midwives; registration of all births and deaths; licensed maternity hospitals and lying-in homes; penalties for committing abortion; maternity and infant welfare stations; licensed boarding homes for children apart from their parents; free hospitals, nurses, and doctors for the poor; commissions and institutions for the blind, deaf and dumb; tuberculosis clinics, nurses, and hospitals; vaccination for smallpox; compulsory closing of public buildings during serious epidemics; reporting and quarantine of all contagious diseases; free distribution of antitoxins; inspection of dairies, bakeries, restaurants and the food-handlers themselves; licenses for innkeepers and sheets of a required length; misbranding and adulteration of food and drugs; exclusion of diseased immigrants; medical examination of school children and physical education in schools; trachoma clinics; one day's rest in seven for workers, reporting and compensation for occupational diseases and industrial accidents; safety laws requiring fire drills, open exit doors, fire-escapes, and guarded belts on machinery; regulation of tenement industries; pure water and milk supply; elimination of public drinking cups, common towels, open sewers and vault

toilets; penalties for causing foul air; garbage disposal regulations; zoning and building laws regulating the height of buildings, the building line, the type of structure in various localities, and forbidding the use of dark, airless, over-crowded or cellar rooms; plumbing and sanitation codes generally; examination and treatment of the venereally infected, prohibitions against the advertising of patented medicines for venereal disease, laws against soliciting and the business of prostitution, injunction and abatement laws under which houses used for immoral purposes may be closed, examination and detention of known prostitutes—even in some places of guilty males; withholding marriage licenses from infected persons; and by no means last in the program of building up a sound and healthy people, eugenical sterilization laws in the last twenty years in many states.

Many health laws, excellent, progressive health laws, much tax money spent on health programs, does this mean good community health? Only where health departments are organized on a non-political basis. This happens occasionally, in the communities where there are enough people interested in good health for themselves and their neighbors to insist on their legal right to it. Perhaps, too, some form of state insurance against sickness based on compulsory contributions from the state,

employers, and employees must be finally adopted in the United States to meet the cases of need which arise by the hundreds and thousands in American communities because of the illness of wage earners who are the heads of families. Many European countries legally admitted long ago that low wages and irregular employment must be off-set by some form of sickness insurance. In the United States, workmen's compensation acts have tended to decrease industrial accidents; social insurance against illness would tend, in the same way, to protect the health of employed persons. . . .

Parks Necessary to Public Welfare

The right of the State to provide for a system of public parks has long been clearly recognized and may in a very logical sense be considered as legislation for the protection of public health as well as public morals. It may seem odd to students of social problems—particularly those concerned with health and juvenile delinquency—to learn that the legal dictionaries and digests may be searched in vain for the word "playground." Of course this is due to the extreme youth of the modern recreation and playground movement as well as to the fact that in law, "parks" may be used to describe "playgrounds." Almost one-half of the states have passed special

statutes since 1915 which permit cities and counties to establish systems of public recreation, including the operating of playgrounds, and usually athletic fields, indoor recreation centers, public baths, swimming pools and the employing of trained play leaders and supervisors. There seems to be little agreement on what is the best social and legal machinery to set up for the management of a recreation system. Some favor a division of recreation in the local board of education; others believe that a special board on parks and playgrounds will do the job most efficiently, still others claim that a municipal recreation commission,—if alternately pestered and encouraged by a private recreation group—will carry on a community recreation program most successfully. In health and recreation, constitutions properly permit home rule and a very wide variation in state and local action. . . .

What is Reasonable and Necessary?

No principle of the law is more firmly established than the broad right of the government to use its power to protect the life and the health of its citizens. In carrying out its duty the State must take care that the provisions of the Federal Constitution and the state constitutions are followed and that the laws and their administration are "reasonable" and

are "necessary." Need it be said that what will be regarded as "constitutional," "reasonable" and "necessary" in public health will forever depend on the newness of a proposal, its scientific and medical standing, the publicity it has received, the legal training and social philosophy of judges, and always, of course, on the wisdom and tact of the administrative officers?

The Federal Government and Health

The Federal government has the power to enforce only such health measures as relate themselves to national affairs, or can be made to fall under the head of foreign or interstate commerce. For example, under national authority have been passed laws and rules to regulate the passage of persons suffering from infectious and contagious diseases from one state to another, to control the sale and transfer of habit-forming drugs, to quarantine districts surrounding United States army cantonments, to inspect cattle intended for interstate shipment, and to cooperate with state boards in promoting the rehabilitation of persons disabled from birth or injured in industry or military service.[1]

The United States Public Health Service is al-

[1] At the present time forty-one states are cooperating with the Federal Board for Vocational Education.

most as old as the country itself and becomes more powerful every year in protecting the good health of the people. It carries on an energetic national public health campaign, it cooperates with state boards of health in the prevention and control of disease, it furnishes the medical and mental examination for the immigration service, it promotes uniformity in the registration of mortality, morbidity and vital statistics, and since the war it has carried on in cooperation with state boards of health an intensive program for the understanding treatment of venereal diseases and the prevention of infection through interstate traffic.

XVIII

SOCIAL RESPONSIBILITY FOR THE POOR

Poor Law Administration Very Poor

The common law seems to have avoided poor relief legislation,—perhaps, in the old days there were fewer poor people and more good neighbors. But in these so-called prosperous modern days practically every American jurisdiction has special laws which provide for the public relief of persons destitute of worldly goods. In no other branch of public service have the American people proven themselves more completely and disastrously unsuccessful. In communities where public poor relief systems have flourished the number of applicants has always increased beyond all reason, and the amount spent has been disgracefully high.[1] The well-known weakness of the American people in local self-government has usually meant that in municipalities where a poor relief system is functioning that many citizens de-

[1] Warner's "American Charities." Brooklyn, Buffalo, and Toledo under their former public relief plans may be cited as examples to prove the statement. The Federal government's Civil War pensions are equally good examples of the wasteful expenditure of public relief money.

mand their share from the public pot as of right, and that politicians are only too happy to share public funds with their friends. A long indictment of public poor relief laws and administration could be written by almost every social worker in the land, but it has been done so often and so well that nothing more really needs to be said.

Poverty: Personal or Social?

The other side of the question has received some attention, but far less than it deserves. The need for charity results very largely from causes over which the poor themselves have little or no personal control. Study the reports of any of the relief agencies in the country and the basic causes of dependency are found to be much the same year after year,—sickness, industrial accident, low wages, unemployment, mental incapacity, death of the normal wage earner for the family. Oh, yes! of course, there are those who are "shiftless" or "lazy," many, many of them, but back of "shiftlessness," and back of "laziness" if you dig deep enough, you will find a worn-out adult, who was a child laborer, you will find undernourishment, tuberculosis, illiteracy, feeblemindedness, lack of vocational training and so on ad infinitum.

Case Work Possible in Public Agencies

The socially-minded man and woman can no longer avoid this issue: Poverty does not just happen accidentally to certain predestined and unfortunate individuals independently of their social and economic environment. Poverty is a public social problem and everyone should assist, through the State, in preventing it and solving it. Uninvestigated and unsupervised public relief administration is both dangerous and extravagant, but the legal principle of public relief is fundamentally sound. . . . With all their weaknesses, who would vote to scrap the public school system or the post office department? . . . Why then is it not possible to have an honorary public board for charity administered by trained social workers who use every standard social case work method for the treatment and care of human need?

It is not only possible but it is already beginning to be done with some success here and there.

Overseers of the Poor or Boards of Welfare?

All over the country in the last decade state and local boards of public welfare have been created to centralize public charitable services and to bring greater effectiveness into the administration of all

types of public welfare institutions, including jails, almshouses and hospitals and the granting of public family relief and pensions. There seems to be at least a happy tendency to free these boards from political interference and to provide for advisory or honorary governing boards. The legal set-up and duties of these boards vary from state to state, but many of them have the supervision of all public and private benevolent and penal institutions, the licensing of child-caring institutions, the receiving for care and placing of neglected and dependent children, the study and institutionalizing of the insane and feebleminded, the deportation of non-resident public charges and so on. When operating as local departments, boards of welfare may be legally empowered to administer family relief, blind and other public pensions, mothers' aid funds—a modern type of poor relief—and may have general supervision of the poor, including the relief of the poor in their own homes, or in city or county hospitals, poor-farms or almshouses, and exercise broad powers in relation to transient dependents, neglected and dependent children, the furnishing of medical and psychiatric care, social case service to courts in divorce, non-support, and adoption cases, etc. Whatever has been done, whatever may be done in the honest administration of public welfare laws in the United States cannot be separated from the in-

terest which men and women show in their public affairs. It may take many years to bring the administration of public relief to as economical and efficient a place as has been gradually achieved by some, although not all, private charities. As a substitute for much of the grumbling against past and present public relief organized efforts should be made by men and women interested in human welfare to modernize and codify poor laws, and to socialize their administration.

Statutory Basis of Poor Laws

Legislative bodies in the United States under the general police power and power to tax may—and do—impose on cities and counties the burden of providing relief for the sick, aged, infirm, and poor legally resident within their boundaries; they may require that certain poor be cared for in public county homes and be required to work for their support as able, and other poor who are perhaps only temporarily dependent be provided for in their own homes.

Shall Relatives Support?

Legislative bodies may at the same time pass such laws as seem wise for the support of certain de-

pendents by their own relatives, wives by husbands, husbands by wives, children by parents, parents by children, and also apparently grandchildren by grandparents, and grandparents by grandchildren, brothers and sisters by brothers and sisters and so on. The support of dependent relatives is naturally only possible when the person legally charged with the support of others is himself safely above the poverty line, and is not already burdened with nearer dependents. Legal exceptions are frequently provided for saving a relative from the compulsory support of one who has forfeited the right to support because of his own misbehavior. In Ohio, for instance, a child need not support a parent who abandoned or wilfully failed to support his child when the child was under sixteen years of age.[2] Legally also the person who furnishes support may provide it in his own home and under such terms or conditions as are most convenient to him.

What Constitutes Legal Residence?

No discussion of poor laws could be ended without at least a reference to "legal settlement" on which practically all poor laws are based and which is of great practical importance to workers in private relief agencies as well. Legal residence, domicile,

[2] Section 12431, Ohio Statutes.

and settlement are almost synonymous terms but "legal settlement" is the term most used in poor law legislation. The words may be defined as describing the place where a person has his fixed and permanent home and where he expects to remain, or if absent, to which he expects to return. . . . Whenever a person's expectations or intentions enter into a situation, confusion and uncertainty may be fully expected and is to be found abundantly in this subject. . . . The actual fact of continuous residence for the full time prescribed in the state statutes is important as well as the *intention* of remaining and establishing a residence.

Gaining and Losing Residence

Adult persons—not including the feebleminded and the insane—may usually change their residence at will although the old residence is not legally lost until a new one has been acquired. There is some legal uncertainty whether a person who has a legal residence in one state loses it merely by obtaining a settlement in another state. There is authority for saying that if he intends to return to the first place his long residence away does not destroy his rights in the first place. The domicile of the husband is that of his wife. A legitimate child secures his domicile through his father if living, an illegitimate

child through his mother. Because public poor relief is purely a statutory matter and relief is contingent upon legal settlement, the actual wording of the various state statutes and the many court interpretations should be thoroughly understood by those who spend money on the poor. . . . And who is able to escape paying taxes or responding when a modern charity drive is on? The private citizen who gives to a beggar on the street, as well as the private social agency are usually under no legal obligations to consider residence, but socially it is bad practice to assume the responsibility of caring for those not living in their own legal settlement.

As a rule, the states provide that persons who receive public relief during the time set for obtaining a settlement do not acquire a settlement; and when persons move into a state they must be able to support themselves at the time of their arrival or residence requirements are longer. Some states provide that persons likely to become public charges may be warned to leave and if this is done they cannot later claim a settlement and relief. Actual non-resident dependents under some state statutes may be removed to the place of their last legal residence or the place of the last longest residence, at the expense of the place of legal residence. All this is of a highly technical nature and the state laws must be carefully followed. Some jurisdictions provide that persons

who have wandered around and lost their residence may be cared for where found. . . .

Poor Legal and Social Practice to Pass-on

Other statutes provide penalities for bringing or sending persons likely to become public charges into a state or city, and public officials, as well as kind-hearted ministers, and untrained social workers may be equally guilty. Trained social workers all use the "transportation agreement" in case work with transients or dependents asking for aid not in their legal residence; and determine by social investigation before they send on any individual that he has a legal residence in the community to which he is being sent or that he has verified resources to care for him there.

XIX

WORKERS AND THE LAW

Who is a Servant?

Those who sell their time and labor to another and grumble as they often think, rhetorically about being "wage slaves," are not so far wrong in their legal terminology.

It is an interesting commentary on the youth of modern industry that the relationship of employer and employee is called in law, master and servant, and is grouped usually as one of the *domestic* relationships. But is it not rather ironic that the old terminology so often fits the modern situation so nicely?

When the law on employer and employee began to develop there were really three divisions of working people, slaves, apprentices, and hired servants. For the most part the servants were thought of as menials or household employees, although servant in law is probably broad enough to cover any agent employed to act for a principal, as for instance a clerk, a bookkeeper, a lawyer.

Apprentices

Slaves, in the chattel property sense, are no more. Also apprentices, in the old sense of persons bound out to learn a trade are no longer of much legal concern in the United States because their number has become rather small and the trade unions seem to manage the matter to their own satisfaction, at least. Under the old common law graduate apprentices had the exclusive legal right to practice the trades. The modern child welfare program with high standards for the protection of every child is gradually replacing the ancient binding out or legal apprenticing of children. Regretfully it is admitted the standards of many of the public and private child placing agencies are as yet little better than those of the old overseer of the poor who found service-places for boys and girls until they reached their majorities. Nevertheless, child placing with thorough investigation of homes and supervision after placement is coming to be regarded more as a social function and less as a technical legal function. . . . However sound or unsound the laws of any state on apprenticing or foster home care of dependent children may be, their just operation will depend, in a large measure, on the alertness of a socially-conscious citizenry and the energy and ability of the professionally trained social workers.

Who Knows the Law on Workers?

With no exception, there is no branch of the law which involves so many people, as intimately, as the law governing work-relationships. The amount of litigation in the field is enormous and the social aspects of the questions presented to the courts are of vital concern to the welfare—if not to the existence—of the state and the people. But in no branch of the law is there less unanimity as to what the principles are or what they should be. The rules on master and servant probably served well enough when few people were in the employ of others, and then on a very personal and intimate basis. The growth of the modern factory system, and the development of huge private corporations,—called in law "artificial persons,"—as employers of labor have changed entirely the human and business aspects of employment. The legal aspects are changing more slowly but they are changing. The subject at the present time seems to lie much more in the controversial field of what should be, than in the legal field of thoroughly satisfactory and established precedents.

Licensed Employment Bureaus

One form of legal protection for workers seems generally popular and firmly fixed, the licensing of

commercial employment bureaus. Under a licensing system the fees charged by an employment agency may be regulated, and many unfair practices lessened. The tragedy of the license plan is that it seems to keep alive the pitiful belief of people that there is always work for the out-of-works. No employment agency, whether it be a national-state-city service, a private charitable organization or a licensed commercial bureau can find work when there is no work in the frequent times of depression. Even in prosperous times the jobs never seem quite to go around any more. . . .

Is the Employee Free to Contract?

The relationship of employer and employee is created in law by a contract between the parties. The contract need not be in writing to be binding unless by its terms it cannot be performed within a year. In general, it is probably still correct to say that the parties to the contract determine their own terms. Once this statement was literally true and almost without limitation except that no contract for an illegal purpose has ever been enforceable. That is to say a contract to commit an assault for an employer, to engage in gambling for him, or nowadays—to make or sell intoxicating liquor for him would not be legal and enforceable. Also, as

has been explained before, courts have held most of the contracts of children and insane persons invalid so as to protect them against the unscrupulous. But until very recent years it has been the rule that other men and women should be "free" to bargain independently with their employers as to hours, conditions of work, and wages. Probably in general this is still the law with courts tending to hold interferences with the "freedom of contract" unconstitutional.

Women Workers

Within our own day however there has been a very definite movement to protect adult women in their dealings with employers. In fact only Alabama, Florida, Iowa, and West Virginia according to the Federal Women's Bureau do not now have some laws regulating the hours of work of women. Ten states have eight hour and seventeen states, nine hour work-days for them. There are twelve states which require that women workers have one day's rest in every seven days, thirteen states provide that women be given thirty minutes to an hour for lunch, sixteen states prohibit their night work in certain industries, almost all the states have some regulations about seats in mercantile and some other establishments, and nine states have enacted some

form of minimum wage legislation for women. The effectiveness of these and other laws in protecting working women depends, of course, to a considerable extent on adequate factory inspection, which is by no means the rule. Most of the labor legislation for women has been passed as necessary to their health and safety and therefore within the police powers of the state, similar in spirit at least to the special protection of child laborers. Probably regulations as to hours of women are now safely established in the law, but women's minimum wage legislation in the United States since 1923 has received several adverse decisions from the courts and its constitutionality at the present time is in much doubt. When public opinion has been developed to see the necessity of living wages, courts will probably take a more liberal attitude on the subject, especially if the laws are framed on elastic lines and administered by competent state wage boards or commissions. Australia has had a minimum wage law for men since 1896, and many European countries, Canadian provinces and other nations have already passed such laws. There is little likelihood that any attempt to give a living wage to the adult males of the United States would stand the test of constitutionality at this time.

Is the Health and Safety of Men Important?

Only a few of the states of the country have laws limiting the legal number of hours for employed men, although in 1917 the United States Supreme Court upheld the constitutionality of a ten hour law for men. Almost all the states limit the number of hours men may be consecutively employed in mines and on railroads. There have been a few other attempts to protect men engaged in certain industries such as cement and saw mills, laundries and other supposedly extra-dangerous employments. An eight hour day is also fairly well-established for public employees in the United States. By far, the greatest advances in limiting the number of hours for men has been made by voluntary agreements in the strongly unionized trades. One day's rest in seven for workingmen, is probably not thoroughly established legally, except perhaps, as part of a program of Sunday observance. It should be remembered that much activity—street car and railroad work, bus driving, milk delivering, power plant operating and so on—is doubtless necessary, even on Sunday and that the old-fashioned blue laws do not cover works of necessity.

What is "Reasonably" Safe?

It has always been the law that it is the duty of the employer to provide his workers with reasonably safe and suitable tools, premises, and reasonably competent fellow servants, free from known dangerous habits, such as excessive drinking or fits of ungovernable temper. . . . What a court will hold to be "reasonable" can hardly be determined in advance. . . . Probably every state in the country has passed within the last fifty years factory and workshop acts dealing primarily with the guarding of belts and shafts; with exit doors; fire escapes, and so on. Factory inspection is generally lax, but some progress has been made in saving workers' lives and health, especially in recent years, through the safety-first-movements in factories and mills which were finding accidents under the modern workmen's compensation acts expensive; more recently, safety councils, departments of chambers of commerce and sometimes independent private social agencies have been doing some valuable work in protecting working people from unnecessary work accidents.

Fulfillment or Breach of Contract?

A contract of employment may be ended almost the same as any other contract between two parties.

The employer and the employee may mutually agree to rescind their bargain. The contract may be ended by mere lapse of the time specified at the start; if no definite period of employment has been agreed on, the arrangement may be ended at any time by either the employer or the employee. Or it may be completely performed by both sides as they originally agreed, and thus ended. Or the contract may be broken by the employer failing to pay the wages he agreed to pay. Or the employee may give the employer just cause for discharging him—by failing to render the reasonably diligent, efficient service which he impliedly at least held out to the employer he would render at the time of the employment contract between them. Wilful disobedience, immorality, dishonesty, neglect of duty, and permanent incapacity by illness all seem to justify a discharge or an ending of the contract of employment. Probably the disobedience or neglect must injure the employer in some way, especially if the employee is not strictly a servant or a menial. The right of an employee to belong to a labor union is legally recognized but with limitations and restrictions, depending somewhat on the time, the place, the circumstance, and the judge. Many employers are bitterly opposed to union workers and there have been supreme court decisions declaring that such employers may discharge employees who join labor

organizations. So far there have been no decisions that it is illegal for employers to organize and to join manufacturers' protective associations and kindred societies. The plain truth is that there is at this time no established labor law which can be counted on to operate with unfailing and uniform justice; only many conflicting opinions as to what it should be. The employee cannot work for others during the hours he is under contract to work for his employer; if he does work at additional tasks his earnings belong legally to the employer.

If an employee leaves an employer without just cause before the contract between them has expired the employer may sue and get a judgment for damages,—although he may have a difficult time in collecting it. If employees enter into a conspiracy to injure their employer he also has a right of action against them. . . . Obviously, whether the "conspiracy" is to injure the employer or to aid the employees will be a very difficult question to answer fairly, always. . . . Mass action in strikes has often been severely condemned by the courts of the country. Peaceful picketing is said to be legal by most courts perhaps. But what is peaceful? . . . The answer will depend on the social and economic point of view of the one called on to answer. All picketing is illegal by statute in some states. That simplifies the answer at any rate. Boycotts are

much more clearly illegal; although it cannot be denied that a "blacklist" of undesirable employees is a kind of labor-boycott that prevails. An employer also has a right to recover from third persons who interfere with his relations to his employees.

The employee may sue for his wages if he is not paid or is improperly discharged. Ordinarily he may recover what he would have earned under the original contract of employment, less what he actually does earn, if anything, from another employer. The recovery of both parties to an employment contract is usually limited to a money award because a court has no way of enforcing an order against the parties to perform their agreement, specifically in person. In other words, if an actor agrees to act only for Sam Blank and also agrees not to work for anyone else for a period of five years, it is obvious that it would not be possible for a court to make the actor perform satisfactorily for Sam but it would be practicable for the court to enjoin the actor from serving another director during the agreed time of five years.

"Characters"

If an employee satisfactorily completes a term of service for his employer he is not entitled as a matter of legal right to a recommendation or a "character"

to give to a new employer. If an employer voluntarily makes a statement about an employee which is critical and injurious, the employer is protected against damages unless it can be shown that he has acted with deliberate malice.

Injuries to the Servant

When most employees were household servants, clerks, or agents, before the modern extensive use of machinery and electricity, there were comparatively few work accidents. There have been some always, of course, and employees have always been at a great disadvantage under the old rules of law which governed master and servant. The servant was presumed in law to accept in advance the "ordinary risks" of his employment, and this included the possibility of serious injury from his "fellow servants." . . . The courts were in hopeless conflict, by the way, in their attempts to define "fellow servant." . . . Although the employer was supposed to issue safety rules, when necessary, and warn a young and inexperienced worker of any lurking dangers in the job, and provide "reasonably" safe quarters and fellow servants, he was, by no means, an *insurer* of the general safety of conditions in his plant. When accidents occurred—and under modern industrial conditions this was appallingly and increasingly

often—what could the injured worker do? He was forced to leave his work, employ an attorney, file his case in court and contest his claim with the employer and, only too frequently, with the employer's insurer and its staff of highly paid and skilled attorneys.

Masters are Powerful

All the circumstances and the law favored the employer and made recovery for the injured worker —or his widow and children—very difficult; and also unreasonably delayed the paltry settlement which naturally could not be avoided in some cases. Any "contributory negligence" on the part of the employee barred his recovery; there was no recovery if the accident had been caused by a "fellow servant"; there was always the further possibility that the court would find that the injured worker had "accepted the risk of injury."

Social Insurance Against Work Accidents

Many of these rules have been changed by the employers' liability acts. Since 1911 when the first modern workmen's compensation law went into effect in New Jersey, the United States government and every state in the country, with the exception

of five southern states, have passed some form of insurance against industrial accident. Not quite a half of these laws establish a state insurance fund. All of them provide for medical attention for the injured worker, and all grant certain death benefits, and varying amounts, for varying periods of incapacity due to work accidents. More recently still, some of the states, perhaps a fourth of those which have laws covering accident insurance, have added occupational diseases to the list of compensatory claims of workers. Under these laws the employee is insured against total, partial, temporary, permanent disabilities and death resulting from accidents to him while at his work. The range in the amounts paid under this type of legislation is very wide, also there is a vast difference in the efficiency of the administration of the laws.

Group Thinking: Then More Labor Legislation?

But if as much genuine progress is made in the law during the next fifteen years in protecting the life, the limb, and the health of employed people as has been made in the past fifteen, all may yet be well with those who do the nation's work. Much remains to be done in the field of enforcement of those labor laws already passed. On many subjects the pages of the statute books lie almost blank be-

fore the people of the United States. What will they finally write there on maternity insurance for employed mothers;[1] on compulsory old age insurance,[2] on unemployment insurance, on minimum wage or living-wage legislation for *all* workers; on the uniform recognition of the principle of collective bargaining; on, perhaps, employee-participation in industrial management, and on the public ownership of the necessaries of life and the means of transportation? There need be little fear of radicalism. The United States is lagging far behind other countries on protective legislation for workers. The danger is that social group thinking and education in the United States is failing to keep pace with the rapid changes in the world of business and industry.

[1] This country is shamefully backward in the compulsory protection and relief of working women just before and after childbirth; mothers' aid or pension laws have had a great vogue since 1911. In January, 1928, forty-two states had some form of widows' or mothers' assistance legislation which usually provides for the relief of certain poor women so that they may be able to keep their children with them in their own homes. Needless to say, in many states these laws are almost valueless because of insufficient funds, narrow scope, or unintelligent administration. Considerable promotional and educational work for the protection of all maternity and infancy has been done in the country since 1921 under the terms of the Sheppard-Towner act with which most of the states are cooperating. Congress has provided that this law shall continue in effect to 1929.

[2] Since 1923 six states have adopted old age pension laws and many other communities have seriously considered the idea.

XX

ALIENS: THEIR IMMIGRATION AND NATURALIZATION

Aliens and Citizens

The man on the streets talks freely and disparagingly,—usually with a qualifying adjective beginning with "d—" about "foreigners." In law the usual term is "alien" which describes a person not born in or under the jurisdiction of the United States, and not yet naturalized. The naturalized person is the one who though born an alien has become a citizen after admission to the United States under the immigration laws and after compliance with the naturalization laws. The states cannot deprive citizens of the United States of state citizenship: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside" . . . It seems legal, however, to limit participation in a primary election to actual members of a certain political party—and to keep Negro citizens from membership in that party and thus deprive them quite effectively, from a voice in state government. Children born in foreign coun-

tries to American citizens are citizens of the United States. Children born in the United States to non-citizen parents subject to the jurisdiction of the United States and permanently domiciled here are citizens of the United States under the Constitution of the United States. The naturalization of an alien father confers citizenship on his minor children. As explained elsewhere, American women who marry aliens do not in general lose their American citizenship, nor do foreign women now gain American citizenship through the naturalization of their husbands. Since 1924 Indians born within the territorial limits of the United States are declared to be citizens of the United States, although the mismanagement of Indian affairs continues in the Indian Bureau which is a part of the United States Department of the Interior. . . . Citizenship by naturalization may be conferred only on aliens who are free white persons, and those of African descent. This bars Mongolians generally; the Chinese are barred from citizenship by special act also. Since the naturalization of aliens is a function of all United States circuit and district courts, and also the various state courts of record it is obvious that interpretations of the meaning of "free white persons" will vary somewhat. In general all Europeans are held to be included in the phrase. Syrians,

Armenians, and high caste Hindus have been—and have not been—held eligible to naturalization.

Is There a True International Law?

Every country has the inherent right to determine how many and what kind of aliens shall be permitted to come in, either temporarily to travel or study or permanently as prospective citizens. Abstractly speaking, Siam, Borneo, China, or Japan by the usual, recognized rules of international law could exclude all American citizens from admission to their territorial borders, should they so decide. Practically speaking, however, is it not humorous to imagine any small or weak country excluding the citizens of any powerful nation even though they wish to come in for distinctly *unfriendly purposes?* . . . It is also true that any country may deport or send away aliens who have been previously admitted. In 1887 the United States decreed that aliens admitted to this country contrary to law could be deported in one year. For about twenty-five years deportation has been possible in certain cases arising within five years of admission. The expense of deportation has usually, however, been an effectual check on broad scale deportations. During the excitement of the World War, Congress passed legislation to exclude and also to expel persons whose

political views were regarded as dangerous, or as having become dangerous, irrespective of the time of their entry into the United States, and many persons were transported under the law. In the United States by the terms of the Federal Constitution, the admission and exclusion of all aliens, as well as their deportation after admission is governed solely by acts of Congress and special treaties between this country and other countries.

Alien Friends

Aliens of friendly countries, resident in the United States, have substantially the same rights as citizens of the United States and are subject to the laws of the country while here. No state under the Federal Constitution may deprive "*any person* of life, liberty or property without due process of law nor deny *any person* within its jurisdiction, of the equal protection of the laws." Political rights such as jury service and voting are not extended to aliens though a state could confer even these privileges on aliens if it seemed expedient to do so. Aliens are also as a rule denied the right to hold any public office; by the Federal Constitution the president of the United States must be a natural-born citizen as distinguished from a naturalized citizen. Resident aliens are subject to our criminal laws as are citizens.

They may make valid contracts and use the courts of the country to enforce their contracts. In general they may sue and be sued in the courts the same as citizens. Many of the states permit them to acquire, own, dispose of, and inherit property in the same way as citizens and this is particularly true of the older states which perhaps once needed to offer inducements to settlers. At common law the right of aliens to buy, hold, or transmit personal or movable goods was the same as for citizens and this is doubtless still the law. But aliens formerly held title to real property—land—under restrictions. If they acquired property by will or deed of purchase the State had the right to declare the property forfeited by a proceeding called office-found. The title of an alien was good unless the State took this action. There was also a definite limitation on the right of an alien either to receive or to transmit property by the general rules of inheritance. These common law rules on the ownership of property by aliens are still in force in some states; in other states the disabilities are all removed; in still others various changes have been made by state statutes. Whatever action a state may take on this subject must not conflict with Federal treaties; otherwise a state may give legal expression to its racial prejudices.

Alien Enemies

Alien enemies, or citizens of a country with which the United States is at war, resident in this country do not have the same rights as aliens of friendly countries. In other words, the rights of an alien may be largely restricted or withdrawn, if while he is a resident of the United States, the country of which he is a citizen and this country go to war. For instance, citizens of Germany living in the United States automatically became alien enemies after the declaration of war on Germany in 1917 and their persons and their property became subject to governmental control. Our government did not exercise its right in every possible case. Many German citizens, or alien enemies, were given passports and permitted to take themselves and their property safely out of the country. As is only too well known, however, the war-fever led in some cases to entirely unnecessary persecutions and many alien enemies were interned and their property confiscated. The law permits all that and doubtless war makes it necessary in many cases, and unavoidable in others. The dishonest manipulation of the property of alien enemies by public officials for personal profit is equally contrary to the law and the prophets.

Immigration Restrictions Increase

Until recently it has been the policy of the United States to encourage immigration to this country. Until practically our own day, settlers, homesteaders, laborers were needed; persons suffering from political or religious persecution in their own lands could always expect a welcome and a refuge in the new nation founded on political and religious freedom. Accordingly, no general law regulating immigration was passed by Congress until 1882. This law placed a head tax of fifty cents [1] on each alien admitted to the country, excluded only convicts, lunatics, idiots, and paupers, and made an exception in favor of political prisoners. The first commissioner of immigration was appointed in 1864; the office of "superintendent of immigration" was established in 1891; the present title "Commissioner-general of Immigration" was adopted in 1895; in 1903 when the United States Department of Commerce and Labor was created the office of Commissioner-general of Immigration was placed in that department. Prior to the ceaseless activity of Congress on the subject of immigration many foreign countries, including, it is said, especially Ireland, England, and Germany took advantage of the open door to the United States and actually deported to

[1] The tax is now $8.00.

this country criminals, paupers, and insane persons by the shipload, if not by the hundreds of thousands during the last century. . . . Such persons and their descendants are now counted among those "superior Nordic immigrants" on which our quota law is based. . . . Whatever may be the arguments in favor of the United States remaining a haven for the downtrodden peoples of the world, the United States was forced in literal self-defense to adopt some regulatory measures on immigration, and once pledged to a restrictive policy, Congress has continued to modify and multiply the restrictions year after year. In spite of the constantly higher barriers placed against immigrants, their number continued to increase and reached a yearly average total of over one million persons in the decade just prior to Europe's entrance into the World War. In 1914, 1,403,081 aliens were admitted but 633,805 aliens, a larger number than usual, departed in the same year. Gradually also larger and larger numbers were being received from southern Europe; whatever may be the scientific standing of the claim that these people are biologically inferior, it is clear they are *different* and present, perhaps for that reason, some difficult problems in assimilation and social and political adjustment. Perhaps if the great war had not come the comprehensive immigration law of 1917 including at last the long-urged literary

test would not have been passed, nor soon afterward the quota laws limiting the number of immigrants who may come into the country during any one year.

XXI

IMMIGRATION AND NATURALIZATION LAWS SUMMARIZED

Congress Controls Immigration and Naturalization

Because all the immigration and naturalization laws of the country are made under Federal auspices and not under conflicting state laws, there should be fewer uncertainties in considering this subject than in some of the others discussed in these papers. Certainly there is much less need for detail here because those interested may refer directly to the immigration and naturalization laws and rules sold by the United States government at trifling expense. But let no one think that however earnestly he may peruse the government pamphlets that he will ever be able to know in advance what may happen in any given case. The Superintendent of Documents for fifteen cents is now sending out the "Immigration Laws and Rules" in a one hundred and seventy-four page pamphlet. As indexed by dates this publication contains thirty-nine acts, as indexed by title fifty-eight acts, and as indexed generally, over eleven pages of fine-government-printing-office-type.

A seven-page leaflet entitled "General Information for Immigrants" printed under date of November 6, 1925, is distributed also, with the admonition of the Commissioner-general of Immigration that "All interested persons who see this pamphlet are urged to study it carefully and to follow it closely" and thus save "much disappointment." As class A exhibits of the power of the printed word to hide, distort, confuse, and abuse thought these publications are remarkable documents. Indeed why not? Does not every Congress and every member thereof always insist on giving just enough time to the subject to devise some new amendments, conditions, limitations, exceptions, restrictions, for the bewilderment of the immigration officials and members of the United States Public Health Service?

Cross Questions and Silly Answers

Oddly enough there is no printed material available for distribution on the physical and mental examination abroad [1] of aliens intending or desiring to emigrate to the United States, although such examinations are now performed in twenty-four urban centers in continental Europe and the British Isles. These examinations are made under author-

[1] Letter of August 14, 1928, to the writer from the Assistant Surgeon-General in the Bureau of Public Health Service.

ity of the act of February 5, 1917, as supplemented by the act approved June 7, 1924. Before August 1925 when the first examinations were made abroad it would have been difficult to find anyone who had ever given any thought to the immigration question who did not heartily agree that departing emigrants should be examined abroad. But is it not amazing how easily a humane and economic principle can be ruined by ridiculous administration? "How many feathers has a goose?" "How long is a rope?" "How does a rabbit run?" It will be a strain for you to believe this but it seems to be true: these questions are not taken from that game you played as a child called cross-questions-and-silly-answers but from the so-called psychiatric examinations made abroad as part of the plan to save inadmissible aliens an unnecessary voyage to the United States. The examination abroad is designed to determine the admissibility of aliens under the standards set by the immigration laws of the United States and of course administered by the immigration officials but the officers engaged in the work are under the exclusive control of the United States Health Service.[2] The immigration law at the same time requires that a physical and mental examination shall be made at a port of the United States by the immi-

[2] Letter of August 13, 1928, to the writer from the Acting Commissioner-General of Immigration.

gration authorities and officers of the Public Health Service. Neither can there be a final decision on the alien's admissibility until after he arrives in the United States even though he is in possession of an immigration or passport visa issued to him abroad. The political management of social problems ever gains its efficiency, if any, through the trial-and-error method. So let there be rejoicing that the first attempt to protect the helpless alien before he leaves his own land has at last been made by the United States government.

A very brief summary of some of the outstanding facts concerning the admission, deportation, and naturalization of aliens to the United States will be given in the hope that "all interested persons" will refer to the original sources of information.

Chinese Excluded

By special Congressional action all Chinese laborers—those who perform manual labor—have been excluded from admission to the United States since 1882. The exclusion does not apply to Chinese who seek admission into this country to teach, study or travel, or to conduct mercantile operations. The American-born children of Chinese parents permanently domiciled in the United States are of course citizens. Apparently if a Chinese is lawfully ad-

mitted and afterward ceases being a student, or through no fault of his own loses his status as a merchant he may remain in the country. The United States employs special officers in the immigration service—not enough to be effective—to seek out Chinese who may be smuggled into this country in violation of the Chinese exclusion act.

Visas

The immigration laws apply to all aliens who seek to come into the United States. In general the relatives of aliens who have declared their intentions to become citizens have no preferred classification. Before admission all aliens must secure from American consuls abroad an immigration visa with the following exceptions: government officials; tourists; bona fide alien seamen; aliens who come in for trade purposes under treaties; aliens lawfully resident in the United States returning from a temporary visit, who carry a permit to re-enter; and aliens lawfully resident in the United States returning from visits to Canada, Newfoundland, Mexico, and Cuba. The possession of a visa does not in any way guarantee that the alien shall be admitted to the United States on arrival here. The possession of a visa means that the alien answered satisfactorily certain questions concerning his eligibility

to enter the United States at the office of an American consul abroad, and that at the time this visa was issued, according to such information as the consul had, the alien appeared to be eligible and not over the quota for a particular month and country. Certainly not a very reassuring basis for giving up one's home and making a long and expensive journey to a foreign land. Why would it not be possible to transfer to immigration inspectors and public health officials abroad the final decision on an alien's admissibility to the United States under the same safeguards as to adequate and scientific investigation, examination, and legal appeal as might operate at a port of entry in the United States?

Numerical Limitations

The annual quota of any nationality is 2 per centum of the number of foreign-born individuals of such nationality in continental United States as determined by the United States census of 1890, but the minimum quota of any nationality which may be admitted is 100. Bona fide students over fifteen years of age are not regarded as quota immigrants. There are also some preferences in favor of the alien wives and unmarried children under eighteen of citizens of the United States.

Others Excluded

No alien ineligible to citizenship is admissible to the United States unless he is a non quota immigrant. The following general classes of aliens are also excluded: those suffering from mental disease or defect, alcoholism, or dangerous physical disease; beggars, paupers, or persons likely to become public charges; felons; prostitutes; polygamists; anarchists; contract laborers; children under sixteen years unaccompanied by parent; and unless protected by treaties, persons living in the western half of China, eastern two-thirds of Afghanistan, British India, eastern Baluchistan, Siam, Sumatra, Borneo, Java, and a few other small Asiatic countries and islands.[3] Also aliens over sixteen years of age are excluded who cannot read, with an exception for illiterates who are seeking to avoid religious persecution; there is also a general exception for aliens who have been convicted of or who advocate purely political offenses, but aliens advocating views contrary to organized government are not admissible. The mental, physical, moral, economic, educational, and quota eligibility of an alien is determined by inspection and examination conducted by the immi-

[3] This last provision does not apply to lawyers, ministers, trav,-elers, and so forth.

gration authorities and officers of the United States Public Health Service on the immigrant's arrival at a port of the United States and to a limited extent by the examination already referred to in specified European centers. Certain minor physical disabilities and even some major physical handicaps do not mandatorily require the exclusion of an alien but must be given consideration as affecting the ability of the person to earn his living. Such an alien may be admitted under bond. Steamship companies are subject to fines if they bring to the United States persons whose disability or disease might have been detected by competent medical examination.

If an alien does not appear to be entitled beyond a doubt to enter the United States, he is detained for a special hearing. No appeal to the Secretary of Labor will lie if the alien is excluded by a medical officer because afflicted with tuberculosis, or loathsome, dangerous or contagious disease, idiocy, imbecility, feeblemindedness, epilepsy, insanity, chronic alcoholism. On other matters, aliens excluded by the special board may ask the Secretary of Labor to review their cases.

Deportation

All aliens brought to the United States in violation of the law are immediately to be sent back to

the country from which they came, at the expense of the steamship company which brought them.

Aliens may be deported within *five* years if at the time of their entry into the United States they were members of any of the excluded classes. They may be deported within *three* years if they fall into need from causes arising since their entry and they desire to return home. They may be deported *irrespective of the time* they have been in this country if they advocate destruction of property, anarchy, or overthrow of the government by force;[4] if they are convicted, or sentenced to prison for one year or more, for a crime involving moral turpitude;[5] or become

[4] It is under these provisions that members—or alleged members—of the Communist Party and Industrial Workers of the World have been deported. During the World War it was held in 266 Federal 34 that "the ordinary rules of evidence do not apply in deportation proceedings." In this case—and it is representative of many—an Italian restaurant keeper was ordered deported during the progress of a mill strike. It was held that a hearsay affidavit could be admitted to prove his belief in the overthrow of government and the destruction of property. He was an active strike sympathizer but denied he had attacked the mill president and manager. Do you suppose that the court was prejudiced because the fellow admitted he had bought no liberty bonds or war savings stamps?

[5] Moral turpitude is one of those common legal phrases which appear almost meaningless in the light of legal definitions and actual decisions. Baldwin's 1928 edition of "Bouvier's Law Dictionary" says: "Everything done contrary to justice, honesty, modesty (sic) or good morals is said to be done with turpitude." Still it has been held that carrying concealed weapons, an act of adultery, criminal libel, disorderly conduct, embezzlement of partnership funds are not crimes involving moral turpitude. Also "it is not a charge of moral turpitude to charge another with being a dirty, drunken cur, lying drunk around the house more than

dependent from causes not shown to have arisen subsequent to their landing, or are found to be connected with the business of prostitution.

Naturalization

The Bureau of Naturalization is under the direction of the Secretary of the United States Department of Labor, and has charge of all matters concerning the naturalization of aliens. Its representatives may assist candidates for citizenship in making their declarations and petitions, and may cooperate with the judges and the clerks of courts which have jurisdiction in naturalization proceedings, furnish blank record forms and so on. It would take a very large staff of well-trained Americanization workers to give all aliens who apply to the various courts of the country the benefit of an individual, sympathetic treatment during their naturalization, although the social value of such a service is evident. The advantage of uniformity in interpreting the naturalization laws and in keeping the records is equally clear. But American voters are much too apathetic to press these issues with Congress.

half the time, and to have poisoned all the cats and dogs in the neighborhood, and to have scalded defendant's cat and kicked his dog, and to have persecuted a poor woman and robbed her of her rights." 76 N. Y. S. 982.

Declaration of Intention

An alien may be admitted to citizenship in the following manner, First: He shall declare on oath before the clerk of any court authorized to naturalize aliens, in the district in which he resides, at least two years prior to his admission, and after he has reached the age of eighteen years, that it is his intention to become a citizen of the United States and to renounce forever all allegiance to any foreign prince or state, of which he may be at the time a citizen or subject. The declaration must set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, in which the alien came to the United States, and his present place of residence in the United States.

Petition

Second: No less than two years nor more than seven years after he has made his declaration he shall file a petition in writing, signed in his own handwriting and verified. In this petition the applicant must state his full name, his place of residence, his occupation, and if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the

United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he must state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition.

The petition shall set forth that he is not opposed to organized government, or a member of any organization teaching disbelief in organized government, a polygamist or a believer in the practice of polygamy, and that it is his intention to reside permanently in the United States, and whether or not he has ever been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial and so on.

Certificate of Arrival

The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a

period of at least five years continuously, and of the State, Territory, or the District of Columbia, in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States. At the time of filing the petition there shall be filed with the clerk of the court a certificate from the Department of Labor, if the petitioner arrived in the United States after 1906, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of the petition.

Court Hearing

Third: He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he renounces all allegiance to any foreign prince, or state.

Fourth: It shall be made to appear to the court admitting any alien that immediately preceding the date of his application he has resided continuously

within the United States five years at least, and within the State or Territory where the court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution is required, and the name, place of residence, and occupation of each witness shall be set forth.

Fifth: In case the alien applying to be admitted to citizenship has borne any hereditary title, he must make an express renunciation of his title or order of nobility.

Sixth: Aliens cannot be naturalized who are unable to speak the English language. The United States has the right to cross-examine all candidates for citizenship concerning any matter affecting admission.

Citizenship Too Easy for Some?

When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized, the widow and minor

children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention.

There are special rules simplifying somewhat the naturalization of aliens who have erroneously exercised the rights of citizens believing themselves already citizens; of Filipinos; of aliens and Porto Ricans who have enlisted in the army or navy of the United States and so on. It should be noted also that under the military naturalization plan very large groups have been admitted to citizenship with practically no regard for their individual fitness.

Citizenship by naturalization may be set aside if illegally procured. If an alien leaves this country within five years after his naturalization, for permanent residence in the country of his nativity his United States citizenship may be canceled.

XXII

SOME THINGS ABOUT CRIMINAL LAW

The Cause and Treatment of Crime

Everyone is interested in crime and criminals. Morbidly so perhaps, but may it not be possible to direct this natural interest into constructive channels? . . . Something might even be done to decrease *poverty* in the world. But who cares at all about poverty? . . . On the other hand almost everyone has a particular theory which explains (?) why America far over-tops every nation on earth in criminal activity. Many of the theories are unsound, of course, and not one of them presents a complete description of the cause and cure of crime. In itself that is not surprising or even discouraging: there is no one cause of crime, and certainly therefore, no one cure. If we were to knit together into a working program of prevention and treatment all —or at least a very great many—of the various explanations of crime, we might at last make an actual start on solving this the oldest and the biggest of the social problems.

For no two crimes in all history ever involved the

exact same combination of hereditary and personal factors, in contact with equal force, with the same social and environmental factors. The bringing about of a wide appreciation of the truth of this statement must precede the first line of defense in the war to end crime. Most people fail to realize that crime in its essence is merely *a type of human behavior;* and that human behavior is the most intricate and baffling subject in the world, needing every resource of science for its understanding, failing always of perfect classification because of the endless, subtle differences in personalities. And yet most of us have been seeking a panacea for crime which may be administered to criminals, with unfailing success, by every court in the land. Criminal law is founded on exact definitions and differentiations of criminal acts punished with uniformity. We cherish the theory that all persons must stand *equal* before the law. But is it not obvious that the uniform treatment of those who suffer from conduct disorders is as futilely illogical as would be the uniform treatment of all stomach pains? Criminals are human beings with all the normal human variations; they differ from each other and from every non-criminal mentally, emotionally, physically; they all have different backgrounds in opportunity, education, experience, habit. That is to say, crime is the result of the personal behavior of an indi-

vidual human being, operating in a set of complex circumstances, stimuli, temptations. It is inconceivable that crime can ever be completely eliminated from society whatever the method used in understanding or treating it, because human conduct cannot be reduced to an unvarying standard which always and in every detail will conform to the rules established by society for personal conduct. Since in fact uniformity of human action is not in itself especially to be desired might it not be well for the State to limit rather strictly the number of public interferences with conduct by enacting fewer criminal prohibita which deal with matters of individual choice or conscience?

Courts: Preventive or Remedial?

Again, it is trite to say that the only truly effective way to deal with crime is to prevent it; but this statement bears much repeating among all the methods which have been proposed for the court treatment of the offender. To an overwhelming extent *prevention* should not be regarded as a legal function at all, but as a function of biology, psychology, medicine, education, social work. Punishments in criminal law have always followed the act, except that peace bonds are sometimes ordered as a protec-

tion against expected injuries. Through an interchange of viewpoint and material between all the groups interested in human conduct a more effective control of crime by courts may be achieved, but courts necessarily must continue largely *remedial* in their specific contributions in this field. A beginning has been made in the socialized or individualized treatment of the juvenile offender, and by way of indeterminate sentences, adult probation and parole, some progress has been made by the regularly constituted criminal courts in the intelligent treatment of crime. However, it should be admitted that such changes in strict legal procedure are to be regarded on the whole, as still in the experimental stage as measures for materially reducing the volume of crime. Indeed, it cannot be too strongly urged that social workers and others who advocate radical changes in long established criminal procedure, first be certain of the scientific soundness of their proposals, and second understand clearly just how their suggestions are to be logically inter-related with the basic principles and procedure of our system of law. Law is only as sacred as it is effective; changes are not to be feared when based on a full understanding of all factors, but propagandists for changes in legal system are too often totally ignorant of present laws and constitutional provisions.

The Legal Nature of Crime

A crime is the commission of an act forbidden by the State, or conversely, sometimes, the failure to perform an act commanded by the State, under penalty. It may be seen at once that a crime is not necessarily an immoral act. Lying (unless in open court), envy, gluttony, pride, may all be sinful but are not criminal. The law is not concerned with mental states, however wicked unless followed by acts of commissions or omissions. A father's mental intention to kill his child followed by a deliberate failure to give necessary food which causes the child to starve to death may be as criminal as a malicious killing by poison. Coloring oleomargarine, failing to use a safety device on a factory machine, using soft coal without a smoke consumer may not be in themselves sinful but are criminal if society says so. Most of the more serious crimes are mala in se, or wrong in themselves, as for example are murder, robbery, burglary. Any act or omission with a few constitutional limitations may be made criminal by vote of a state legislature. Important restrictions on the right of the people to legislate on the subject of crimes are these: no state may deprive anyone of life or property "without due process of law," deny anyone the "equal protection of the laws," nor pass any ex post facto law or a

law which has a retroactive effect, that is, a law making an act a crime *now* which was innocent *when done.*

Crimes and Torts

Primarily, a crime is an infringement of the rights of the general public, and against the security and happiness of the social group. As already explained however a crime against the state may at the same time be a special injury to a particular person for which he may bring a civil action for damages. For example, society may punish rape as a crime, but in addition the woman who has suffered the attack may recover her peculiar damages, if the guilty one has any assets. A person who is injured by an act which is solely a private injury may always settle or compromise the matter without court action; a person injured by a criminal act does not have a right to agree not to prosecute; in fact if one who has been injured by a criminal act settles with the offender and refuses to prosecute him, the one who has been injured may himself become guilty of "compounding a felony."

Felonies and Misdemeanors

Criminals are all delinquents and misdemeanants. It is the usual custom however to refer to juvenile offenders against the law as delinquents and to reserve the somewhat harsher term, criminal, for adults. Again, crimes are divided into felonies, or the acts punishable by death or imprisonment in a penitentiary, and misdemeanors, the less serious crimes or delinquencies punishable by fines or jail terms. State legislatures have the power to say which crimes shall be felonies and which misdemeanors and to establish and change the punishments. Treason against the United States consists in levying war or giving aid and comfort to the enemies of the country; while sometimes referred to as a separate division of crime, with us, treason is merely a serious variety of felony. A person may be tried for a felony whenever an indictment is returned against him and an indictment may be drawn many years after the commission of a crime. In misdemeanor cases the accused may be brought before the judge for immediate trial without a formal indictment, and as a rule if he is not arrested and brought to trial within a limited number of years after the commission of the misdemeanor the charge will be outlawed, or as we say "limitations will have run." Anyone may see the wisdom of this.

If a burglary, robbery, or murder has been committed it may take years to locate the guilty one, but when he is found he should be tried, but how foolish it would be to try a man for drunkenness ten years after he had been drunk, or to try him for exceeding the speed limit, years after the speeding.

A Classification of Crime

There have been many attempts to classify crime but none of them is strictly logical or satisfactory, because the nature of crime is complex and every criminal act necessarily injures more than one person, right or thing. No particular merit is claimed for the classification which is offered here. It is merely given so that some of the main divisions of the subject may be seen at a glance.

I. Crimes *primarily* against the sovereignty of the State:

Treason, perjury, bribery, malfeasance of officials, resistance to officers, rioting, offenses connected with voting, etc.

It should be noted, of course, that every crime is contrary to general public justice and public peace.

II. Crimes *primarily* against public morals and health:

For example, abortion, bigamy, open and

notorious adultery, indecent exposure, incest, rape, sodomy, seduction, prostitution, etc.

Variations in the law under this head occur with changing educational and religious opinion.

III. Crimes *primarily* against the person:

Homicides or unlawful killings of all degrees, assault and battery, abduction, kidnapping, etc.

It is obvious that there is overlapping between this group and group II.

IV. Crimes *primarily* against property:

Larceny, embezzlement, pocketpicking, receiving stolen goods, obtaining goods by false pretense, robbery, etc., including offenses against the home which are regarded by the law as especially serious such as burglary, arson, etc.

In this group an injury to property may mean also a definite injury to the person as well, as in robbery for instance.

The Intention

It has been said that evil mental states unfollowed by criminal acts or criminal omissions are not crimes. It is equally true that an act done by a person whose mind is innocent of evil design and who makes a

mistake of fact is not guilty of crime. Shooting at a squirrel and accidently killing a man, who comes suddenly into range, is not murder although it may be manslaughter—an unlawful killing without malice—if actual negligence is shown. On the other hand the law presumes that people intend the inevitable consequences of their acts. For example, deliberately shooting at a person merely to frighten him would probably be at least second degree murder, if the person dies as a result of the shooting.

Giving Permission

In some cases giving permission to a person to commit a crime may excuse him, from criminal responsibility, as in rape for instance; but if two persons enter into a suicide pact and one of them gives the other permission to kill him the permission will not excuse the one who successfully kills his partner but fails to die himself.

Who May Commit a Crime?

The rule of the law is that anyone who is a free and responsible person may be held for crime. That sounds simple and straightforward, does it not? Probably the words are as plain as any words could be; the idea which they cover necessarily is full of

complexities. Who is free and who is responsible? Inevitable difficulties arise in defining, interpreting and limiting the legal answer. The degree of guilt may vary somewhat between the principal or actual perpetrator of a crime; the aiders, and abettors, present and assisting with the crime, perhaps as principals in the second degree; and accessaries, or those who assist the chief offender before or after the crime. A corrupt conspiracy may also exist between a group of accomplices in which each becomes the actual agent of the other and all guilty in the same degree.

Some People Have Limited Criminal Capacity

It has already been pointed out that the law absolutely excuses children under seven years of age from all criminal responsibility, and may excuse those between seven and fourteen depending upon their individual development and capacity; that formerly a boy under fourteen was presumed incapable of committing rape but that some American courts hold that his ability to commit this act is one *of fact* and not one of law. Also it has been shown that the common law presumed a married woman to be under the domination of her husband if the husband was present at the time of her crime, but that it has always been possible to prove that a married

woman in fact acts independently or freely in crime. Likewise it has been shown that persons suffering from mental disabilities whether insane or feeble-minded are regarded in law as "responsible" if able, in general, to distinguish between right and wrong. Aliens or persons of foreign birth resident in the United States are amenable to our criminal laws the same as citizens, except that public ministers in the diplomatic service, their families and retinue are subject to the criminal laws of their own countries but are exempt from criminal prosecution in this country. Consuls are commercial agents and are subject to the criminal jurisdiction of the country in which they are working.

Some Acts are Legally Excused

Necessary acts done in the line of duty by officers of the law in making arrests, restraining prisoners, preventing escapes, executing sentences, suppressing riots or preventing the commission of felonies generally are excused in law. However, the law must be followed exactly and nothing done which is not necessary or authorized. Even private citizens may legally arrest or restrain persons discovered in the act of committing serious crime. Then too, persons standing in certain relationships to others have rights or responsibilities which unrelated persons do

not have; for instance, it would be a crime to whip a neighbor's child but ordinarily not a crime to whip one's own child, it would be a crime to assault a neighbor's wife by kissing her, but not so one's own wife; as a rule it would be a crime to desert and fail to support one's child, not so for the father of an illegitimate child in many states, and so on.

Self-defense

The unlawful killing of a human being is homicide but the one who kills another may be excused from punishment if he is able to show that the crime was committed in self-defense. In a word this means: The killing must have been *necessary*. In other words, a person may legally kill another in order to save his own life, or to escape serious bodily harm when all other means of escape have been cut off. The same force may be used in defending members of one's family as in defending one's self and probably also in defending anyone who is in dire need of protection. Fears for *future* safety, and unfounded and unreasonable fears generally are not legal defenses. As a rule the aggressor in an encounter may not plead self-defense, although if he has honestly withdrawn from the affray he may afterward use necessary force in defending his own life in a renewed attack. In defense of one's own

home, or to prevent felony there need be no retreat but even here there must be an actual present *necessity* for taking life or self-defense will not be a valid excuse. In defense of real or personal property other than the family dwelling force may also be used but life must not be taken unless it is necessary to prevent serious felony. Killing to prevent a felony but not to save one's property unless it be the "castle" raises some rather complicated issues which are usually easier to avoid than to understand. Doubtless the safest rule for the amateur criminal is to kill not at all unless unavoidably driven into a corner from which there is no possible escape alive.

XXIII

THE TRIAL OF THE ACCUSED

Differing Attitudes on Punishment

Blackstone said the underlying philosophy of the English common law was that "it is better for ninety-nine guilty persons to escape than for one innocent person to be punished." Many of the principles and technical rules of our criminal law grew up in this philosophy, but as a matter of practice, the ninety-nine guilty persons have never been able to escape until our own day. Felonies, under the old common law, were punished by the forfeiture of the land and goods of the offender and by "corruption of blood," or loss of the right to receive and transfer property by inheritance. Until the time of George III there were about two hundred crimes in England punishable by the death penalty, including such comparatively trivial acts as cutting down a tree, counterfeiting the stamps used in the sale of perfumery, and so on. In England today, only the commission of treason and murder carry the death penalty; in about ten of the American states

this is also the rule. In several of our states the death penalty is entirely abolished; in some it is inflicted for rape and arson, as well as for murder; in North Carolina it is the punishment for burglary; and in California for train wrecking. It is not possible to show that mere severity of punishment decreases crime; the causes of crime are much too complex to be controlled by any such simple device as heavy penalty alone. But it is hard not to avoid the conclusion that the old philosophy which favored the accused leads to serious difficulties unless buttressed with a system of heavy penalties or at least *certain* penalties, which, in America, we indisputably do not have.

Is it not doubtful whether life and property are in general less safe and secure now than in the old days of the rigorous common law, or that states which have no death penalty have more crime on that account than states which do? Newspapers and improved—those still far from uniform systems of keeping criminal statistics—have focused attention on present day crime with the result that some people have become almost hysterical about so-called "crime waves" and the increase in crime. The United States does have more crime than England and other European countries all the time, but should not a higher criminal rate be expected in a young, fast developing country where all the condi-

tions of life are less well settled than in older countries and where there is a large population of heterogeneous alien people who lack at first all knowledge and understanding of our customs and laws? . . . These people are not necessarily more criminal than our own people, but naturally are less well adjusted. . . . Then too, in a democracy there is constant temptation for the sovereign people to tinker with their court machinery and to multiply endlessly, the number and variety of crimes,—violations of city ordinances, Federal and state laws all count in criminal reports and statistics. Possibly also, though this is by no means proven, the commission of certain criminal offenses such as traffic violations, and violations of the prohibition laws may tend to develop a type of citizen naturally lawless in more serious matters, and with a well developed I'll-take-a-chance-and-get-away-with-it-attitude.

Understanding Better Than Severity

The point of all this seems to be that although some of the states and many of the American cities do have a vast volume of crime, it is by no means certain that crime is increasing—nor that it cannot be decreased. Real headway towards material decreases in crime will necessitate much educational work; the sentimental, indignant, vindictive atti-

tude of the average person towards crime must be in some way remoulded into intelligent understanding. It is beyond the scope of these papers to undertake the discussion of educational propaganda and social reform; it is enough to say certain things could be done. There must be a uniform system of accurate statistics on crime, probably also some system of national identification and record keeping. Those who have been led to appreciate that crime is a complex matter and who know something of the history and operation of criminal law may become less willing to meddle in judicial reforms through patchwork legislation, but will expect courts and lawyers to take the initiative in recommending such reasonable methods of trial and treatment, as will be consistent with the American theory of government and law, and at the same time in harmony with the sound principles of modern psychology, medicine, and social work. A detail discussion of criminal precedure would be of great social value to everyone; and it is regrettable that schools and colleges do not give simple, required courses in a subject which touches so closely the welfare of the country. Hardly more than a mere enumeration of a few of the general principles and rules can be given here.

As in every division of the law, the leading principles are much the same in all of the states with local differences in custom, considerable conflict of

court opinion on some questions, and actual and significant variations in state statutes.

Where are Criminals Tried?

The general criminal jurisdiction of the Federal courts is limited to crimes arising under the Federal Constitution and statutes. The boundaries of a country are interpreted to extend, three miles beyond low water mark on the sea. This "three mile limit" rule became so well and popularly known right after the passage of the national prohibition laws that during 1924 the Secretary of State became very busy and secured signatures to "conventions" or treaties between the United States and the other leading world powers "to prevent the smuggling of intoxicating liquor." Under these treaties foreign vessels may be searched or seized when it is reasonably suspected that they are carrying liquor but they are safe "beyond a greater distance from the United States than can be traversed in one hour" by the guilty vessel. Thus we have the present twelve mile limit for national prohibition enforcement. . . . It is not yet a crime against the United States to give away, sell or possess liquor on the high seas.[1] . . . The United States courts also have jurisdiction over crimes committed on ships sailing

[1] See the United States *vs.* 2180 Cases of Champagne, C.C.A.

the high seas which carry the American flag and over all crimes committed on the public navigable waters in or adjacent to the United States.

The states have authority to punish all crimes arising under their own laws and committed within their own boundaries. The general rule in homicide cases is that a crime is regarded as occurring where the blow is struck or the poison administered rather than in the place where the death may actually occur later on. It may be interesting to note in this connection that the death must occur within a year and a day from the time the attempt is made to kill, or the guilty one cannot be held legally responsible. If a crime is committed in one state and the guilty one flees to another state, under the terms of the Federal Constitution the governor of the second state must return the fugitive. If the governor of the second state refuses to honor the extradition papers, what then? The Federal courts have the power to interfere and to order the governor to obey. . . .

Arrests and Warrants

After a crime has been committed the first step in the proceeding to redress the wrong which has been done is usually an arrest, although sometimes an indictment by a grand jury precedes the arrest. As is only too well known in this country, in a very large

per cent of the crimes committed neither an arrest nor an indictment ever follows, simply because the offender is never discovered at all. . . . Perhaps then the kind of police officers and detectives employed has as much to do with the high criminal rate as the abstract criminal law. . . . An arrest may be made by an officer of the law or even by a private citizen without a warrant, when a person is discovered in the act of committing a felony, or there is reasonable ground to believe a felony has been committed. A warrant is merely a written order permitting an arrest. A warrant should not be issued unless there is cause to believe the person charged with the crime is guilty. It should be sworn to and signed by the complainant. If the warrant is not secured before the arrest is made, it should be secured immediately thereafter. Reasonable force may be used in serving a warrant, or usually in making any lawful arrest.

Speedy Trials

If the person arrested is accused of misdemeanor he usually goes to trial at once before a magistrate or police justice and the matter is soon finally disposed of. Under the Federal Constitution and probably under most of the state constitutions the accused is entitled to a "speedy trial." Exactly what

"speedy" means will necessarily depend on many facts, and the length of time elapsing between the arrest and the trial will vary greatly in different cases. There should never be any *unwarranted delay*, but courts become so clogged with cases sometimes that in felony charges delays of many months frequently occur. States sometimes limit the period which may elapse between arrest and trial to two or three terms of court. Probably the speed with which trials are started and conducted, and the *certainty* of *definite penalties* on a finding of guilt have more power to deter crime than *heavy* penalties.

Bail

If the accused is not placed on trial immediately, in most cases he is entitled to bail; the abstract right to be released on bail before trial may exist, even in capital cases, unless the "proof is evident." The bail required must not be excessive. Poor people however are often unable to secure bail bonds in *any* amount and so they are very often committed to jail prior to trial. Sometimes in less serious matters people are released "on their own recognizance," that is on their own promise to appear for hearing. The amount of a bail bond is forfeited to the State if the accused does not appear for his trial.

Indictment

By the Federal Constitution and by many of the state constitutions no one can be tried for an infamous crime or felony unless a formal written accusation of crime, or an indictment has been returned against him. The indictment is sometimes made after the arrest and sometimes before, and is drawn after deliberations by a grand jury. A grand jury is composed of a larger number of persons than are in the trial, small, or petit jury. Grand jurors are called from the county or community where the crime occurred and may be electors or citizens and have such other qualifications as the law in the various states requires. They hear only one side of a case—the state's side—and it is for them to say whether there is enough evidence against an accused person to justify the expense of a prosecution. In some states an "information" or accusation of crime may be made by a public officer, usually a prosecuting attorney, without action by a grand jury. This is probably as fair for the defendant, and cheaper for the state. Constitutional limitations in some states make it impossible to adopt informations in place of indictments by grand juries; constitutions may always be amended, of course.

Form of Indictment

The indictment must be worded very specifically. It must state *where* the crime occurred, that is the venue must be laid exactly and the trial must be in the place where the crime occurred unless a fair trial is not possible in that place. The indictment must state *who* committed the crime by name and address; *when* the crime was committed must also be given; and *how* the crime was committed. There are persons who say that all this involves technicalities. In a sense that is true because the defendant may file pleas or motions which delay the proceedings, if the indictment is not very carefully drawn, or if the proof offered at the trial does not correspond to the facts alleged in the indictment. On the other hand, those who complain of technicalities should keep in mind that the person accused of crime may not be guilty at all and that the State, always more powerful than a single individual, could convict many innocent persons of crime if it were possible to accuse and try people on *vague* accusations or to find them guilty of crimes which have not been mentioned in the indictment. How could anyone, even an innocent person, defend himself unless he knows in advance just what he will be called on to prove and to disprove at his trial? How, for instance, could an alibi be established if

the exact time when a crime was committed were not stated in advance?

"I Do Not Prosecute"

Prosecuting attorneys may fail to prosecute after indictments or "true bills" have been returned, if for good and sufficient reasons they feel it unwise to go to trial. On the prosecuting attorney falls the burden of making out the State's case. If he is reasonably certain in advance that the case cannot be made out, it is only sensible to let him say so in advance and enter a "nolle pros." This power can be and undoubtedly is abused by some prosecuting attorneys. There is a method of redress: the people should refuse to re-elect prosecutors who "nolle pros" indictments for personal or other dishonest motives; or should refuse to re-elect officers who appoint unsuitable public prosecutors.

Arraignment

The accused is entitled to a copy of the indictment so that he may see what he will be called on to prove at his trial. The indictment is also read to him when he is arraigned. If it is a felony charge, the accused must come before the court in person at the time of the arraignment and enter his plea to the

indictment. That is, he must tell the court whether he is "guilty" or "not guilty." If he admits his guilt the usual procedure is for the judge to sentence the accused, at once.

When is a Motion Technical?

If the plea is "not guilty" the defendant, before his trial, may raise a question concerning the authority of the court to hear his case; or the defendant may suggest that there were irregularities in the grand jury proceedings; or that the facts alleged in the indictment, though true, do not constitute a crime under the laws of a particular state; or that the facts stated in the indictment are false; or that he has already been tried and convicted or acquitted on the same charge. All of these various pleas or answers which the accused may file through his attorney have particular names, "pleas to the jurisdiction," "pleas in abatement," "demurrers," "pleas in bar," and so on. It is true a clever and industrious lawyer may unduly delay criminal proceedings by the use of various motions. Frivolous motions based on immaterial matters or motions filed merely for the sake of delay should be condemned. However, would it not be seriously unjust to deny defendants the privilege of filing motions which present important issues to the court? It

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should be kept in mind also that the guilt of the accused never is a matter for the attorney to decide. In our legal system, the question of guilt is a matter for a *jury* to decide. It should be and is the duty of the attorney to take every honest advantage of every material irregularity or mistake in the proceedings, to give the accused the opportunity to have an honest interpretation of the law in his case, as well as a fair presentation of the facts.

Are the Guilty Entitled to a Defense?

There are many persons who seem to feel that if the guilt of a person is evident, that an honest and honorable lawyer should refuse to defend the accused. Is this a fair attitude? If all lawyers were to refuse to defend persons who appear guilty, guilty persons would never be able to avail themselves of the orderly and established principles of law, and surely even the guilty have a right to a fair trial, unless we believe in universal lynch law. On the other hand, the public has the right to criticize lawyers who file frivolous motions for the sole purpose of delay, or who in the trial of cases resort to tricky and dishonorable methods to gain the release of guilty persons. If an attorney,—who is always an officer of the court and law,—follows the established, and regular rules of the law, he is merely

seeing that accused persons are given the ordinary benefits of the law of the land. If we are not satisfied with the law as it is, that is another matter.

The Right to a Lawyer

It is hard not to feel that many injustices arise because the friendless prisoner cannot often afford a lawyer who will gain for him every just advantage of the law, while a rich and powerful prisoner, equally guilty perhaps, is able to buy for himself every legal resource, and in some cases for that very reason, ultimately gains his freedom. After all this is the real difficulty. It would be disastrous if all attorneys were to refuse to assist accused persons to secure regular trials according to the laws of the country; it is equally disastrous that so many states fail to provide an adequate public-defense-service for poor persons unable to employ legal counsel for themselves. Under the Federal Constitution, the accused has the right to appear by counsel at his trial and this is a constitutional provision in many of the states. Any court has the right to assign an attorney to represent a person accused of crime, but this is not generally done except in serious felony cases. Assigned counsels except in sensational murder cases are rather apt to give little consideration to cases. If not paid, how indeed can they afford

to give the necessary time to the defense of persons who are unable to pay for their services? In more than half of the states, there are laws providing for the public pay of assigned counsel, but the compensation is usually low. For this reason, only the less experienced attorneys are as a rule anxious to serve in assigned cases; young or unsuccessful lawyers are often very glad to be assigned criminal cases. This means of course that the defense of poor prisoners is not conducted as carefully and conscientiously, as the defense of the well-to-do. In only a few states are counsels assigned in misdemeanor cases. In a few cities under state laws public defenders are now functioning and may perhaps prove the best way of making justice equal in criminal cases. The person accused of crime always has the right to appear in person and conduct his own defense, but if he does not happen to be a lawyer it is obvious that he will be unable to defend himself successfully.

XXIV

CONTINUING THE TRIAL

Innocent Until Proven Guilty

Every accused person always goes into trial with the presumption in his favor that he is innocent of the crime of which he is accused. That is, in law no one is guilty until he has been proven guilty and beyond a reasonable doubt. It may be said that such a presumption and such a rule of evidence give the accused every advantage. This is true. But it should be kept in mind that innocent persons unjustly accused of crime,—and there are many of these,—have the right to the same advantage. Clearly, life and liberty could soon be destroyed by a government which had the power to punish on a presumption or an appearance of guilt, unsustained by complete proof.

The Jury System Again

If the jury system is functioning satisfactorily, there need be little fear that guilty persons will escape conviction. Under our national Constitution and the constitutions of most of the states, the find-

ing of guilt or innocence against every person accused of crime rests with an impartial jury chosen from the neighborhood where the crime is committed. Jurors must not be related to the defendant or the party injured, and are subject to many other objections or "challenges," by both the State and the defendant. Jurors serve under oath and after the case has been finally argued and has been submitted to them they are not permitted to separate until they have finished their deliberations. Unless a state constitution provides otherwise, the number on a trial jury is twelve and the conclusion or verdict reached must be a unanimous one. A few states are now permitting juries to render legal verdicts by a three-fourths or even a two-thirds vote in some cases. In most jurisdictions a single juror may still hold up a decision and in case of disagreement a new trial is necessary. In Ohio an "alternate juror," or additional juror may be selected who votes only when a regular juror becomes incapacitated during a trial. By such a provision mistrials in long, expensive criminal cases may sometimes be avoided. The jury system is undergoing constant criticism but because it is one of the oldest features of the common law it is not likely to be abolished. Doubtless however, the system worked much better when the neighborhoods from which the jurors were called were smaller and more unified in interests, and when

people had more time to give to public matters than they seem to have today. The insistence of some attorneys on finding jurors who claim they have never heard of a notorious criminal case is ridiculous in this newspaper era and commonly means that only the empty-headed and near-illiterate sit on many important juries.

Public officials, clergymen, physicians, attorneys, and so on, are usually exempt from jury service; persons who do not believe in a death penalty are excused. The exemptions often open the doors wide for many of the best qualified people in the community, educationally and intellectually, to escape jury service. The jury system is a fundamental part of our government and our legal system. If it fails, public justice fails. Service on juries should therefore be mandatory on every citizen, man and woman, who is intellectually, educationally, and morally qualified to sit in judgment on others. The peace time business of the state is as important as its war time service, or as important as any private business could possibly be. Flimsy, personal excuses should never be accepted. Excuses based on verified, *individual* conditions should replace all the general class exemptions.

Should the Defendant Testify?

The defendant has the right to testify in his own behalf under our constitutional form of government, but under the common law he was denied this privilege. He cannot however, now, be compelled to testify against himself. If he fails to testify, his silence cannot be commented on by the prosecuting attorney. This rule seems to favor the accused unreasonably and to discriminate against the rights of the general public and properly has been changed in some of the states. If the accused testifies in his own behalf, he may be cross-examined the same as any other witness.

Hearsay and Dying Declarations

In general, hearsay evidence is not admissible in any criminal trial, because such evidence is not based on the first hand, personal knowledge of the one testifying in court, but is merely repetition from memory of something seen and heard by another person who is not present and under oath. So called "dying declarations" are admissible in murder cases and these are exceptions to the hearsay rule. That is, when a person who is in a dying condition and who realizes that he is dying, makes a statement concerning the attack which has been

made on him, the statement although made by one who is now dead, may be admitted as evidence either to free or to convict the one who is accused of the murder.

What is Circumstantial Evidence?

It is common for many people to say that they do not believe in "circumstantial evidence" and that they would not convict a person on such evidence. This is an expression of ignorance because as a matter of fact, all evidence ever offered in any case is circumstantial, and if it were not possible to admit circumstantial evidence it would never be possible to convict anyone of any crime. By circumstantial evidence is meant evidence of a fact from which the existence of other facts may be logically inferred. If a jury draws an illogical conclusion or if a jury draws an absurd conclusion from the evidence offered that is not the fault of circumstantial evidence but is the fault of our jury system which permits ignorant, untrained, and unfitted persons to serve; and excuses, all too frequently, the better fitted citizens of the community.

To say that most evidence is circumstantial is strictly true. Suppose two men are known to be in a room together, two shots are heard, the door suddenly opens and one of the men comes rushing out

with a smoking revolver in his hand and runs down the street; and the other man is found lying dead in the room. No one is present and no one sees exactly what happened. There is no *direct evidence* that the one who came running out shot the other, but do not all of the *circumstances* of the case indicate that he did? On the other hand, suppose that clear evidence is offered in court to show that the one who was killed had frequently threatened the life of the other, and that on the morning of the killing the dead man had placed his pistol in his pocket and remarked that he intended to kill the other that day. Suppose the man who was killed weighed 175 pounds and was a strong and vigorous individual, and that the other weighed barely 120 pounds and was timid and retiring; and when the dead man was discovered in the room he was clasping in his right hand his own revolver with one chamber empty, and a bullet of the same caliber was discovered lodged in the wall of the room. From all of these additional *circumstances* could not a jury perhaps logically conclude that the one who killed the other did so in self-defense?

Suppose again that you see a man point a gun at another and hear him say, "I'm going to kill you," that an explosion follows and the other drops dead. Would you refuse to accept this evidence because you do not believe in circumstantial evidence? . . .

Is it clear beyond every doubt that the person who fired the shot is guilty of first degree murder? Certainly not. Suppose it is shown on the trial that the two men were the best of friends, that they had never had the slightest misunderstanding, that the one who said, "I'm going to kill you," did so in jest,—some people will do foolish things like that,—that his gun was loaded with *blanks* and the blank which was fired actually took *effect in the wall*, and the man dropped dead from heart failure at the exact moment the gun exploded. Extreme case? It is, but does it not prove that all evidence is circumstantial?

A Word About Witnesses

Generally, the accused has the right to meet the witnesses face to face. If they are not able to come to the court, because of sickness or because they are out of the state, depositions may be taken on notice to the other side and before a notary or other authorized person. All witnesses are subject to cross-examination or re-examination by the other side. The accused has the right to require the attendance of witnesses in his favor and at the discretion of the court to have them kept separately and out of the court room before testifying. The evidence of witnesses is always given under oath or affirmation.

Should the Ability to Make Good Be Considered?

It has been said that the crime as described in the indictment must be proven and the burden of proof is on the prosecution, or the State. That is, the issue is: Did *this* defendant commit *this* act? For this reason evidence of the general *bad character* of the accused cannot be introduced by the State, that is, witnesses are not permitted to testify concerning the *bad reputation* of the accused. In other words, the fact that the accused person has been guilty of many other crimes does not in law prove that he is guilty of this particular crime. The accused may show if he so desires, by witnesses in his behalf, that his general reputation on the issue involved in a given case has been good. This then permits the prosecution to show the reverse, if possible. The social policy of these legal rules may be seriously questioned. It should not be possible to convict a man on his general bad reputation *alone* but why should not his *character* be considered by the jury in reaching its conclusion? Character is made up of those things which actually make the man; reputation of what he is thought to be. The law is not concerned with the criminal but with the crime; not with his character but with his reputation,—sometimes! Perhaps it is for this reason that

the law so often fails to reconstruct persons who come before it. Social workers know that every fact about a person has some bearing upon his ability to live successfully in society. The mental capacity, the physical condition, the emotional make up, the education, the occupation, the religion, the habits and reactions generally of a person as well as his social and environmental background play a definite part in motivating action or causing crime, and must be considered in controlling, treating,—or as the law states it,—punishing crime.

Other Incidents of Trial

After all the evidence of the State has been given, the defense gives its evidence and "rests." The State then has the right to rebut the evidence which has been offered by the defendant, if possible. After this follow the arguments or the statements of the attorneys which review the evidence. Finally the judge gives the charge which is the judge's explanation to the jury of the law which governs the case. After this the jury retires. A foreman, who is really the jury's chairman, is elected and the jury considers the evidence which has been presented in the trial. The jury may find the accused person guilty as charged in the indictment, or guilty of a lesser

degree than charged in the indictment, or it may find the accused "not guilty," or it may fail to reach a verdict.

If "not guilty" the defendant is discharged.

If the jury fails to reach a decision the defendant may be re-tried, although sometimes the prosecuting attorney, especially after two or more disagreements, may not ask for another rehearing. If found guilty the defendant may ask for another trial, because of alleged irregularities in the first trial, misconduct of the judge or jury, the discovery of new material evidence, and so on. If the defendant does not secure a new trial he may go to an upper court and ask for a review of all of the errors he has objected to and which appear in his "bill of exceptions." All this may be regarded as technical, because it is thus that many delays occur. But after all, how else would it be possible to guarantee a just and fair trial to any person accused of crime? Criticism should be made if new trials are granted or reversals of judgment ordered for trivial reasons which do not have any definite bearing on the essential guilt or innocence of the accused. Justifiable criticisms may also be made where wealthy defendants are able to prolong unreasonably the cases against them, or when there are not a sufficient number of judges to hear and dispose of all cases with promptness.

Sentences

After a verdict of guilty is given, the judgment of the court is given, that is, the sentence or the punishment which the law has set for the particular crime is explained to the prisoner. The accused must be present at the time the sentence is imposed, and he has the right to make a statement if he desires. The right of a judge to suspend sentence or to withhold indefinitely the passing of sentence is sometimes recognized. On principle it would seem that after a jury has found a prisoner guilty, the sentence should be served unless a pardon is granted by the president or a governor; or a release is ordered by direction of a legally established parole board. The sentence may be a fine, a term of years in a penal institution or both with costs of prosecution; or in capital cases, a life term or a death penalty. The sentence is for a definite term of years, or in some states an indeterminate sentence is given. When the sentence is indeterminate a maximum and a minimum term are usually set. The exact number of years to be served under an indeterminate sentence, in theory at least, will be determined by the capacity of the defendant for reformation. In practice an indeterminate sentence seems too frequently to set a mimimum time at which the prisoner seeks a release from serving out

his sentence in an institution. There can be no social or legal objection to the principle of parole or release before the maximum number of years has been served, if the prisoner has shown himself capable of making a new and successful adjustment in the community and when released will actually be under the definite supervision of a trained parole officer who is not too overburdened with cases to render real assistance in any case. In some states a sentence may be suspended and the one convicted released under the supervision of a probation officer before any time has been served in an institution. Again, probation does not prove successful unless a careful examination has been made into the background, character, habits, and ability of the prisoner and there is a sound basis for supposing that he will be able to make good under supervision. As in parole, probation often means merely a release from suffering any of the consequences of a finding of guilt. It may be suggested that an *adequate number* of *well trained* probation and parole officers would be a great expense to the taxpayers. Crime is always an enormous financial burden. Scientific probation and parole service would in all probability prove much less expensive than the usual legal methods in use at the present time. Crime is an individual and a social problem. If it is ever to be reduced it must be treated individually, and

socially, and that means there must be truly *indefinite* sentences, and high type probation and parole service, based on complete social, medical, and mental examination and treatment. In a growing group of states one who has been convicted of several successive offenses becomes an "habitual offender" and may be given a heavier penalty for a crime than may be imposed on a first offender. The Baumes Laws of New York State are examples of an attempt to attach more serious penalties to supposedly hardened offenders. If habitual criminal acts are administered by courts which have at their disposal ample facilities for social investigation, and heavy penalties are then imposed as a part of individualized and socialized treatment the results would doubtless be excellent. However, no one need expect heavy penalties in themselves to prevent or cure the crimes of certain feebleminded persons or emotionally unstable persons or persons with serious handicaps in their social environment.

Habeas Corpus

One of the oldest and most dearly loved doctrines of English and American law is that the legality of a detention or imprisonment may always be tested by a writ of habeas corpus. Under this writ an immediate hearing may always be secured to deter-

mine whether a person is legally deprived of his liberty. Naturally if he has been regularly tried and found guilty he cannot secure his release in this way unless he has served his full time and has not been discharged. If an innocent person has been found guilty and the guilty person has afterward confessed, it is doubtful whether the prisoner could secure his release by a habeas corpus hearing. An application for a pardon or a parole should be made for the innocent person. Will the State make restitution for the suffering of the innocent in such a case? Generally, no. Perhaps another reason why it is better for the guilty . . . though not too many guilty . . . to escape than to punish the innocent.

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